A GUIDE TO THE LABOUR RELATIONS ACT

May, 1993

Ontario
Labour Relations
Board

Commission
des relations de travail
de l'Ontario

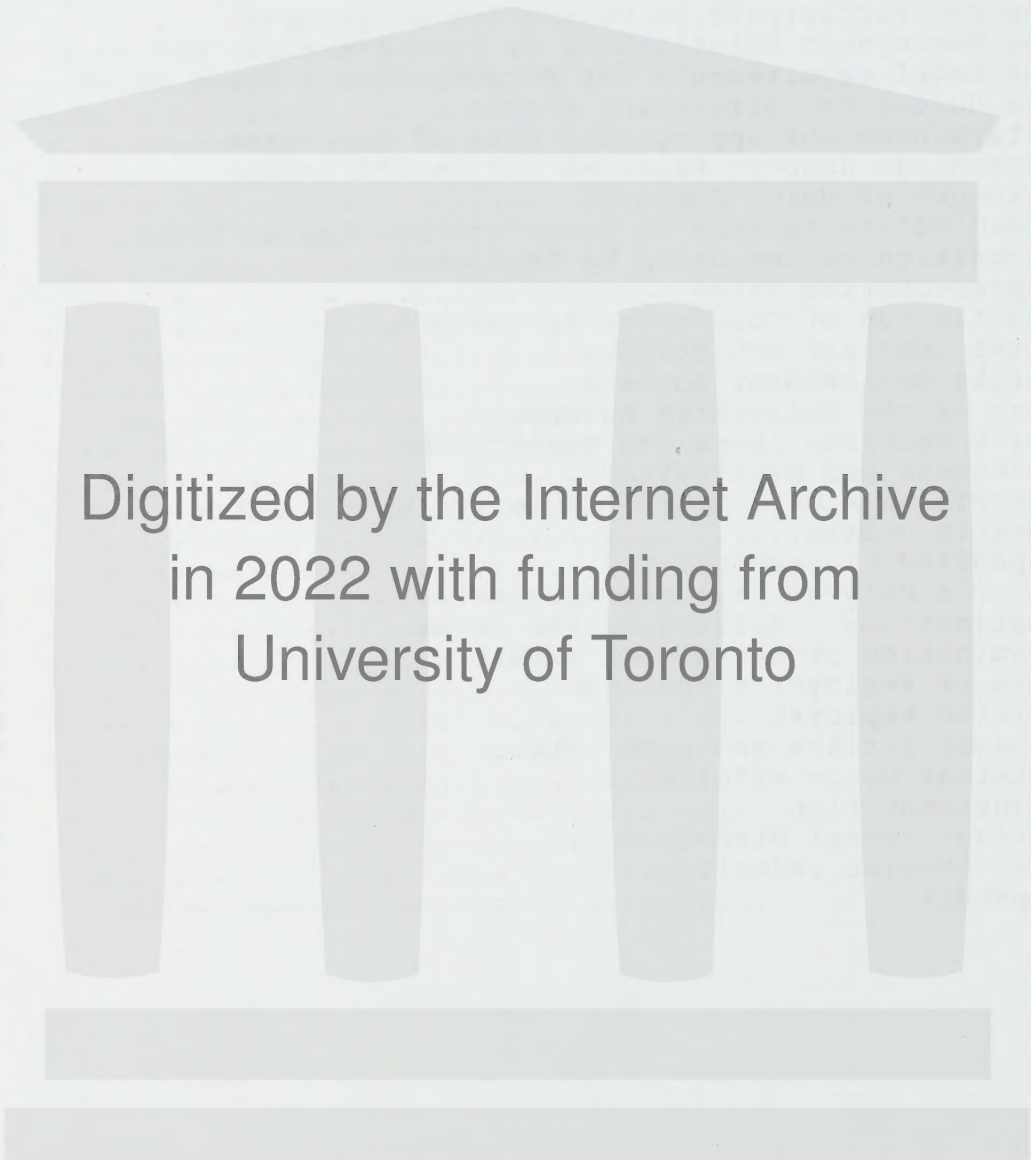
Caution: This guide is not a complete statement of the law. In order to ascertain your strict legal rights, reference should be made to the Labour Relations Act and regulations, and Board decisions. The law changes almost every day. Amendments to the Labour Relations Act or other legislation and subsequent Board decisions may affect the rights and obligations discussed in this publication. Check the date of this booklet and ensure that there have been no changes since its publication!

A GUIDE TO THE LABOUR RELATIONS ACT

May, 1993

Ontario Labour Relations Board
Commission des relations de travail de l'Ontario

Table of Contents



Introduction

What this guide is

Whether you are an employee, trade union, or an employer, it is important that you understand your rights under Ontario's labour laws. The primary statute regulating labour relations and collective bargaining in Ontario is the Labour Relations Act which covers most employees in the 'the private sector'. The purpose of this guide is to set out in a straightforward manner both the operation of the Labour Relations Act, and its implications for employers and employees.

What this guide is not

This guide is not an exhaustive statement of labour law, but only a simplified statement of the basic principles. It may not be a complete answer to your own particular problem. Persons with specific problems related to labour relations should consult a competent adviser. This adviser need not be a lawyer but should be someone familiar with the terms of the Labour Relations Act and the practices of the Ontario Labour Relations Board. The Ontario Labour Relations Board itself cannot give you legal advice as to what steps you should take in order to solve your own particular problem.

Persons who wish to consult a lawyer and do not have their own lawyer may call the Lawyer Referral Service of the Law Society of Upper Canada. The telephone number in Toronto is 947-3330. Those calling from outside the Toronto area may call toll free by dialling 1-800-268-8326. Those calling from area code 807 may call toll free by dialling 1-800-668-8526. The lawyers who are on the referral list have agreed to conduct a one-half hour interview with prospective clients without charging for that initial one-half hour consultation. Persons involved in proceedings before the Board may also be entitled to Legal Aid, provided they meet the financial and other requirements of the Legal Aid scheme. Legal Aid maintains offices throughout the province of Ontario.

The Labour Relations Act

The Act is intended to provide a means whereby a group of employees can choose a trade union to represent them. They do so by showing that the majority of them desire such representation. Once the union is chosen, it can then bargain on behalf of the employees in order to arrive at an agreement with their employer as to what wages they will be paid, and what benefits and working conditions they will have. The Act contains a number of provisions that protect the right of employees to organize free from interference by their employer. The Act also ensures that the trade union continues to be representative of the employees for whom it holds bargaining rights. The Act is intended to promote orderly collective bargaining and there are a number of sections regulating the bargaining process, the contents of collective agreements, the timing of strikes and lock-outs, and the use of replacement workers during strikes and lock-outs. There are also provisions requiring unions to represent fairly the employees for whom they bargain and to provide their members with certain basic information about the conduct of union affairs.

The Ontario Labour Relations Board

The Labour Relations Act is not interpreted, administered and enforced by the courts as, for example, is the criminal law. The Act is administered by an independent tribunal called the Ontario Labour Relations Board. This tribunal has special experience in labour relations matters and consists of a neutral chair, alternate chair and vice-chairs, and Board members representing labour and management.

In some respects the Board proceeds in the same way as a court - it holds hearings, witnesses give evidence under oath and its decisions are legally binding. However, its proceedings are much less formal than those of a court, and some types of cases are decided without an oral hearing being held. Parties are entitled, but not required, to be represented by lawyers. Cases are heard either by a panel composed of a neutral chair, a represe tative of labour, and a representative of management, or by a neutral chair alone.

The Board has a field staff comprised of labour relations officers and returning officers. The labour relations officers attempt to facilitate settlement between parties in many areas, including certification applications, unfair labour practice complaints, construction industry grievances, and unlawful strikes and unlawful lock-outs. Where, in the course of certification proceedings, bargaining unit issues arise, the officers may be directed to prepare reports on these issues to assist the Board in making its final determination. The returning officers conduct the various votes directed by the Board under the provisions of the Act.

The Ontario Labour Relations Board is entrusted with the responsibility of applying the rules set out in the Labour Relations Act to individual cases. This responsibility often requires the Board to establish policies that clarify the rules found in the Act. The principles set out in this guide therefore represent a combination of the basic rules contained in the statute together with the policies of the Ontario Labour Relations Board, which elaborate these principles and put them into practice. Where a statement in the guide is based upon a particular section of the Act, the section number has been indicated. Copies of the Act and of the Board's Rules of Procedure and Forms are available from the Ontario Labour Relations Board.

The offices of the Ontario Labour Relations Board are located in Toronto at:

400 University Avenue
Toronto, Ontario M7A 1V4
Telephone (416) 326-7500

The Ontario Labour Relations Board is an independent tribunal which reports to the Legislature through the Minister of Labour. The Ministry of Labour is responsible for many other programs that affect employees and employers under other legislation, including the Occupational Health and Safety Act, and the Employment Standards Act.

For information about the Ministry of Labour or its programs, the Ministry can be contacted at its main office or at any of its district offices listed below.

Main Office
400 University Avenue
Toronto, Ontario
M7A 1T7

Industrial Health and Safety	(416)326-7770 1-800-268-8013
Construction Health and Safety	(416)326-7770 1-800-268-8013
Mining Health and Safety (Sudbury)	(705)675-4464 1-800-461-4000
Employment Practices	(416)326-7160 1-800-387-2965
	French 326-7210 1-800-668-8515

Ministry of Labour Offices

Barrie
114 Worsley Street
Barrie, Ontario
L4M 1M1
(705) 722-6642
1-800-461-4383

Dryden
479 Government Road
Dryden, Ontario
P8N 3B3
(807) 223-4898

Elliot Lake (Mining only)
151 Ontario Avenue
Elliot Lake, Ontario
P5A 2T2
(705) 848-2885
(call collect)

Hamilton
1 Jarvis Street
Hamilton, Ontario
L8R 3J2
(416) 577-6221
1-800-263-6906

Kapuskasing
273 3rd Ave.
Kapuskasing, Ontario
P1N 1E2
(705) 267-6231
1-800-461-9847

Kenora
Box 231
Kenora, Ontario
P9N 3X3
(807) 468-2712
1-800-465-1104

Kingston
115 Clarence Street
Kingston, Ontario
K7L 5N6
(613) 545-0989
1-800-267-0915

Kirkland Lake (Mining only)
6 Tweedsmuir Avenue
Kirkland Lake, Ontario
P2N 1H9
(705) 567-5292
(call collect)

Kitchener
824 King Street West
Kitchener, Ontario
N2G 1G1
(519) 744-8101
1-800-265-2468

London
130 Dufferin Avenue
London, Ontario
N6A 1K7
(519) 744-8101
1-800-265-4707

Marathon
Central Mall
2 Hemlo Drive, Suite 23
Marathon, Ontario
P0T 2E0
(807) 229-3202

North Bay
Northgate Square
1500 Fisher Street
North Bay, Ontario
P1B 2H3
(705) 494-7176
1-800-461-1654

Ottawa
1111 Prince of Wales Drive
Ottawa, Ontario
K2C 3T2
(613) 228-8050
1-800-267-1916

Peterborough
815 High Street
Peterborough, Ontario
K9J 8J9
(705) 876-1800
1-800-461-1425

Sarnia
700 Christina Street North
Sarnia, Ontario
N7V 3C2
(519)336-1200
1-800-265-1416

Sault Ste. Marie
390 Bay Street
Sault Ste. Marie, Ont.
P6A 1X2
(705) 949-3331
1-800-461-7268

Scarborough
2275 Midland Avenue
Scarborough, Ontario
M1P 3E7
(416) 314-5300
1-800-268-6541

St. Catharines
3350 Merrittville Highway
Thorold, Ontario
L2V 4Y6
(416) 682-7261
1-800-263-7260

Sudbury
199 Larch Street
Sudbury, Ontario
P3E 5P9
(705) 675-4455
1-800-461-4000

Thunder Bay
435 James Street South
Thunder Bay, Ontario
P7E 6E3
(807) 475-1691
1-800-465-5016

Timmins
273 Third Avenue
Timmins, Ontario
P4N 1E2
(705) 267-6231
1-800-461-9847

Toronto Downtown
123 Edward Street
Toronto, Ontario
M5G 2G2
(416) 314-6060
1-800-387-2965

(416) 236-7210 (French)
1-800-668-8515 (French)

Windsor
500 Ouellette Avenue
Windsor, Ontario
N9A 1B3
(519) 256-8277
1-800-265-5140

Toll-Free Long Distance: If you live in the local calling area call the number listed. If you are outside the local area and within the area code, call the number listed under 1-800.

Who Can Participate in Collective Bargaining

What is collective bargaining?
Collective bargaining is a system allowing employees to deal with their employer collectively through a trade union, rather than on an individual basis. Unions negotiate and reach agreements with employers on wages and working conditions for a group of employees that they represent and act on behalf of those employees in matters arising under collective agreements.

Does collective bargaining have government approval?
Yes. The Labour Relations Act has a "purpose clause" which says that one of its purposes is to protect the right of employees to be represented by a trade union of their choice and to participate in its lawful activities. The clause includes other purposes such as:

- enhancing the ability of employees to negotiate their terms and conditions of employment
- encouraging co-operative approaches between employers and trade unions
- encouraging employee participation in the workplace
- promoting harmonious labour relations
- providing for effective, fair, and expeditious methods of resolving disputes. (Section 2.1)

Does the Labour Relations Act apply to everyone?
NO. Some groups of employees are covered by their own special legislation, while other groups are excluded from the Act altogether. The first question you must decide is whether the Act applies to you. Those groups who are not covered by the Act are set out below.

Groups covered by their own legislation

Members of a police force. These include civilian employees. Security guards, even if they are sworn in as special constables, are covered by the Labour Relations Act. Members of police forces engage in collective bargaining under the terms of the Police Act.

Full-time firefighters. They carry on collective bargaining under the provisions of the Fire Departments Act.

Teachers. Collective bargaining by teachers employed by school boards under the Education Act is conducted under the terms of the School Boards and Teachers Collective Negotiations Act. **Provincial Crown employees.** The Crown Employees Collective Bargaining Act sets out the parameters for collective bargaining for civil servants employed by the government of Ontario.

Hospital employees. They are covered by both the Labour Relations Act and by the Hospital Labour Disputes Arbitration Act.

Community College employees. They are covered by the Colleges Collective Bargaining Act.

Persons employed in industries or occupations regulated by the federal government

By virtue of the division of powers between the government of Ontario and the federal government, labour relations matters concerning persons employed in areas regulated by the federal government are subject to federal labour laws. Federal labour laws cover federal government employees. In addition, people employed in inter-provincial transportation or communication (for example: railway, shipping, airlines or telephone services) and other businesses under federal regulation such as banks, television and radio stations and grain elevators, are governed by legislation passed by the federal government. Their minimum wages, hours of work, vacation pay, etc. as well as collective bargaining rights are determined by federal law.

Occupational groups excluded

The Labour Relations Act regulates collective bargaining by employees in most other occupational fields. A few occupational fields are excluded from the application of that Act. However, collective bargaining in all other fields, not expressly excluded, is governed by the Labour Relations Act.

Those occupational groups of employees excluded are:

-- Farmers, hunters and trappers.
-- Workers engaged in landscaping and the growing of plants. This exclusion does not apply to employees of employers whose primary business is not agriculture or horticulture, nor to employees engaged in the growing and cutting of timber.
-- Physicians, including interns and residents, to whom the Ontario Medical Association Dues Act applies. (Section 2)

Certain people who appear to be self-employed may be entitled to take advantage of the provisions of the Act benefiting employees, if the Board finds them to be 'dependent contractors'. A dependent contractor is a person performing work or services who is in a position of economic dependence upon the person paying for the work so that that person more closely resembles an employee than an independent businessperson. Some taxi drivers or truck drivers, for example, may be dependent contractors even if they own their own cab or truck. (Section 1(1)).

Exclusion of managerial and confidential employees

People who exercise managerial functions are excluded from the Act. The Ontario Labour Relations Board decides who is or is not a manager where this is in issue. In making such decisions the Board looks primarily at the degree of supervision and control the person exercises over others. Does the person have the power to hire and fire? To grant time off? To grant or recommend promotions and wage increases? To make decisions involving the exercise of independent judgment and discretion? In the manufacturing field, non-working forepersons are generally defined as managerial, while lead hands are considered employees. A managerial title does not, by itself, make a person managerial.

People employed in a confidential capacity in matters relating to labour relations are also excluded. Again, the Ontario Labour Relations Board decides who fits into this category and who does not. (Section 1(3))

The Employment Relationship of People Without Unions

As a general rule, in the absence of a union, wage rates and other conditions of employment are settled between the individual employer and employee, without government intervention. There are, however, certain Acts that set minimum standards for these relationships, whether or not employees have a written contract, or are members of a union, or are covered by a collective agreement. Of course, many employees will have a contract with their employer or collective agreement that provides for wages and benefits above the basic minimums. In that case an employee's right to the amount above the minimum will usually depend upon the terms of the contract or collective agreement.

The Ontario Human Rights Code, administered by the Ontario Human Rights Commission (Phone: 416-314-4500) forbids discrimination with regard to hiring, dismissal, promotion, apprenticeship, seniority, or terms or conditions of employment on the basis of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age (between 18 and 65), record of offences, marital status, family status or handicap. The Code also prohibits trade unions and self-governing professions from discriminating on any of these grounds, except for record of offences.

The Employment Standards Act is administered by the Employment Standards Branch of the Ministry of Labour (Phone: 416-326-7160). It governs hours of work, minimum wages, overtime pay, public holidays, vacation with pay, the payment of equal pay for substantially equal work by men and women, discrimination in employee benefits plans on the basis of age, sex, or marital status, pregnancy leave, termination pay or notice, and payment of wages. The Branch also enforces the provisions of the Act that forbid (a) the dismissal of employees because their wages have been subject to garnishment, and (b) employer deductions from wages in the absence of authorization by a statute or a court, or written permission from the employee. As indicated above, the rights guaranteed by this legislation cannot be reduced by any private agreement that an employee may have with an employer. The law relating to apprentices is administered by the Apprenticeship Branch of the Ministry of Skills Development (Phone: 416-326-5605).

Can employees who are excluded from the Labour Relations Act participate in collective bargaining?
There is no simple answer to this question. A group of employees who are excluded from the Labour Relations Act (and are not covered by their own special legislation, such as full time firefighters), can form an association and bargain as a group. However, this form of bargaining has no support or protection from the Act. An employer is not required to recognize or bargain with such organizations as it would have to do with a certified trade union. Any collective agreement signed would not itself be an enforceable contract although it may be enforceable outside of the Act because its terms have been incorporated in the individual employees' contracts of employment. A trade union has a legal obligation to fairly represent the employees for whom it has bargaining rights but an association outside the Act probably has no such obligation.

The rights of employees outside the Labour Relations Act are governed by the common law, and the common law is far from clear. In general, the common law does not recognize collective bargaining, so that any attempt to carry on bargaining outside the Act faces serious legal difficulties unless all parties are prepared to voluntarily participate in bargaining and accept the results. This arrangement is wholly voluntary and is probably not legally enforceable. In addition, employees covered by the Act cannot be fired or discriminated against because of their trade union activity, but persons excluded from the Act have no such protection apart from their individual contracts of employment.

The Legal Requirements for Establishing a Trade Union

What is a trade union?
A trade union is an organization of employees formed for purposes that include the regulation of relations between its member-employees and their employers. It may be a local union or a provincial, a national, or an international union, or a certified council of trade unions. It may also be an independent employee association. In order to bargain on behalf of employees and enter into binding collective agreements, a trade union must prove it is a 'union' within the meaning of the Labour Relations Act. In other words, it must prove its 'status'. (Section 1(1))

What must a group of employees do to form an organization that will be recognized as a trade union?
The Ontario Labour Relations Board decides whether or not an organized group of employees qualifies as a trade union. The requirements for trade union status can become rather technical in particular cases, so that persons seeking to draft a constitution and form a trade union should consider consulting a solicitor before doing so. The following criteria must be met by the organization seeking to prove to the Ontario Labour Relations Board that it is a trade union:

> The union must satisfy the Board that it is an organization of employees. The correct procedure is as follows: the employees proposing to form a trade union hold a meeting; a written constitution is prepared; the employee group votes to approve the constitution; then, the employees involved become members; and finally, the members vote to ratify the constitution. Then they elect officers of the union to administer its business and represent it. A somewhat different approach is to have the employee group apply to a larger (or parent) trade union for a charter as a 'local' of the larger union. Such a charter would normally provide that the members of the local will adhere to the constitution of the parent union. Evidence must then be presented to the Board to show that the charter was properly issued to the local in accordance with the constitution of the parent union.

The organization must show that one purpose of its formation is to regulate relations between employees and employers. This is normally done by having the constitution of the union state exactly that.

The organization must show that it is capable of taking on the responsibilities of a union. Essentially, this means that following ratification of the constitution, the membership must elect officers who are capable of taking action on behalf of the members.

How can a group of employees demonstrate that they have fulfilled all of the requirements?
They generally must prove their status as a trade union when they first apply to the Board for certification. Normally, a person directly connected with the formation of the union gives testimony under oath about the events surrounding both the formation of the union and the election of the officers. This person would also provide the Board with a copy of the union's constitution. It is usual to have a person keep minutes of the meetings at which the union was formed and officers elected. Then that person can give the relevant testimony to the Board. The advantages of this approach are that the person can refer to the minutes during testimony and file those minutes as an exhibit with the Board. All these steps are unnecessary if the employees are joining an established organization that has already been certified for other groups of employees in Ontario.

Are there any other important points employees should know about when they form a trade union?
Yes. The Act prohibits the Board from certifying any organization that was formed with assistance from an employer.

Also, the Board cannot certify a group that discriminates against any person on any ground of discrimination prohibited by the Human Rights Code or the Canadian Charter of Rights and Freedoms. (For example: race, creed, colour, ethnic origin, citizenship, ancestry, age, sex, sexual orientation, place of origin, marital status, family status, or handicap.) (Section 13)

Must a union prove its status all over again every time it asks to be certified?
No. A union need only prove its status once. Note, however, that an organization that has been recognized as a trade union in another province, or by the Canada Labour Relations Board, does not automatically have such status in Ontario. Such a union must prove that it is a trade union the first time it appears in a proceeding before the Ontario Labour Relations Board. (Section 107)

Can a trade union lose its status?
Although it seldom happens, it is possible for the Board to decide that an organization that once was recognized by the Board as a trade union is no longer a trade union. This might happen if there have been major changes in the structure or function of the organization. Changes in the internal operation of a union would, however, seldom be sufficient reason for an organization to lose its status as a trade union if these changes were in accordance with the union's constitution.

Can an 'association' be recognized as a trade union?
Yes. The test is whether or not the organization meets the criteria of a trade union, not what it calls itself. For example, groups such as the Ontario Nurses' Association, the Schneider's Employees' Association and the Christian Labour Association of Canada are recognized trade unions. A union may be an entirely independent local organization and need not be affiliated with any other trade union or association.

How Unions Get Bargaining Rights

How does a union acquire the right to represent employees with their employer?
There are two methods. The first, and most common, is certification. Essentially, this means obtaining a certificate from the Ontario Labour Relations Board declaring that the union is the exclusive bargaining agent for a defined group of employees in a bargaining unit that the Board considers appropriate for collective bargaining. (Section 5)

The second method is voluntary recognition. Voluntary recognition of a union is considered to occur when an employer and the union agree in writing that the employer recognizes the union as the exclusive bargaining agent of the employees in a defined bargaining unit. This is usually done by private arrangement without any government supervision and is normal in the construction industry. (Section 1(3.1))

What can employees do if their employer voluntarily recognizes a trade union other than the one they would prefer?
The Labour Relations Act protects employees in such situations. In the first year following voluntary recognition, or in the first year of the first collective agreement's operation following voluntary recognition, any employee affected -- or any union that the employee may have joined -- may take the matter to the Ontario Labour Relations Board. They can ask for a declaration that the employer-recognized union was not, at the time of recognition, entitled to represent the employees.

When such action is taken, it is then up to the voluntarily-recognized trade union to show the Board that it is, in fact, a trade union as defined by the Act, that it did not receive any assistance from a member of management, and that it had the support of the majority of the employees it claims to represent at the time it received voluntary recognition. If it cannot do so, the Board can nullify both the voluntary recognition agreement and any collective agreements that the union and the employer may have entered into. Remember, a trade union must be independent of the influence of management. Any union that is not independent cannot be certified, and no collective agreement signed by such union is legally binding. Forming a trade union is essentially a matter for the employees -- the choice is theirs. An employer cannot impose a particular trade union upon its employees by voluntarily recognizing the union that it prefers to deal with. (Section 61)

What rights does a union have once it is certified?
Essentially a union gets two rights. First, it becomes the exclusive bargaining agent for all the employees in the bargaining unit whether or not they are members of the union. This means that the employer cannot settle wages and working conditions directly with the employees in the bargaining unit, whether they are union members or not, or negotiate with a union other than the one that has been certified. The employer must negotiate with the union that has been certified and that union only (Section 68(1)). Second, the union gains the right to insist that the employer bargain in good faith in order to reach a collective agreement. Both the union and the employer have a legal obligation to bargain in good faith and make every reasonable effort to enter into a collective agreement. (Section 15)

Do employees gain any other rights once a union is certified to represent them?
Yes. Once a union is certified by the Board or is voluntarily recognized, no employee may be discharged or disciplined except for just cause. (Section 81.2)

How does an organization apply for certification?
A union is certified when it is able to show that the majority of the employees want it to be their bargaining agent. Majority support can be proved by means of signed membership cards, or by a representation vote or both. Normally the union applies for certification on Form A-1 -- 'Application for Certification before the Ontario Labour Relations Board'. Applications for certification in the construction industry are made on Form A-65.

The forms can be obtained from the Ontario Labour Relations Board. Seven copies must be filed with the Board. The membership cards indicating that the union has the required level of employee support must be filed on or before the date the application for certification is filed. (For the percentage support that the union must have before the Board will certify the union or order a representation vote see page 25). (Section 8, Rules 6-12 and 43-45)

How are filings made with the Board?
Any document, including applications, letters or membership evidence may be filed with the Board by addressing it to the Registrar at Ontario Labour Relations Board, 400 University Ave., Toronto, Ontario M7A 1V4. A document that is filed by registered mail is treated as being filed on the date that it is mailed, as verified in writing by the Post Office. Any document that arrives at the Board by any other means, or any document that is in relation to a case under sections 11.1 (organizing and picketing on property that is normally open to the public), 41 (first contract arbitration), 73.1 (replacement worker restrictions), 73.2 (specified replacement workers), 92.1 (interim orders),

92.2 (complaints during organizing activities), 93 (jurisdictional disputes), 94, 95, or 137 (direction in respect of unlawful lock-out or strike), or 126 (construction industry grievances) is treated as being filed on the date it is received by the Board.

Applications, responses, evidence of employee membership in a union or of objection to a union, and evidence of employee wishes concerning representation cannot be filed by facsimile transmission. Only other documents which are short and urgent may be sent to the Board in this manner. (Rule 8, 9)

When can an organization apply for certification?
If no other union holds bargaining rights for the affected employees, the application can be made at any time. (Section 5(1))

What if a group of employees is already covered by a collective agreement, but want to change unions?
If the collective agreement is for three years or less, an application for certification by another union can be made after the commencement of the last two months of the agreement.

Where the agreement is for more than three years, then an application for certification can be made in the last two months of its third year of operation, or in the last two months of each subsequent year, or after the commencement of the last two months of the agreement (Section 5(2)-5(5)). The entitlement to make an application after the expiry of the agreement will depend upon whether a conciliation officer has been appointed and whether a legal strike has commenced. (Section 62)

What if the existing collective agreement states that it will continue to operate for a further term or terms if neither the union nor the employer gives notice to bargain for modifications?
In such a situation another union could apply to be certified during the last two months of the agreement's stated date of operation, and during the last two months of each year that it continues to operate. (Section 5(6))

What happens when a trade union is certified, but fails to negotiate a first collective agreement?
In that case, another union can apply for certification, but only after one year has gone by from the date of the original certification. This period of time may be extended somewhat if the certified union has gone through the conciliation process or has commenced a legal strike, or if the employer has legally locked-out its employees. (Sections 58(1) and 62)

If an organization's application for certification is unsuccessful, when can it re-apply?
There is no simple answer to this question. The Ontario Labour Relations Board can prohibit re-application for up to 10 months. In practice, however, the Board will only prohibit re-application for six months, if at all. Generally, the Board only prohibits re-application for any period of time if the first application was dismissed because the union lost a representation vote. If the application was unsuccessful for another reason, most often re-application can be made at any time.

It should be noted that the Board will not allow a union to withdraw an application for certification merely to escape anticipated defeat in a representation vote.

The Board's approach is different if one union is seeking to displace another. Here the Board will be concerned that the right of employees to change unions is balanced against the desirability of stability in the employer-union relationship. In these situations a union applying for certification usually gets only 'one bite of the apple.' If a first application is unsuccessful, a six-month bar is imposed on any further application by the same union. (Section 105(2)(i))

What if an employer carries on related businesses under more than one name or through more than one company?
A trade union can apply to the Board for a declaration that the corporations, firms, or individuals involved are one employer. The Board may make such a declaration if the related activities or businesses are carried on under common direction and control. This provision is of greatest relevance where a company without a trade union is used by those who control it to undermine bargaining rights that a union has with a related company. When raised in the context of an application for certification, the Board may certify the union as bargaining agent for the employees of all the corporations, firms, or individuals involved provided that it has the required level of overall support. It is also open to an employer in a certification proceeding to ask the Board for such a declaration. (Section 1(4))

What happens when a trade union applies for certification?
When it receives the application, the Board informs both the union and employer of the date of the hearing, except in the construction industry. The Board may certify a union in the construction industry without holding a hearing. Hearings are held at the Board offices at 400 University Avenue, Toronto.

Are hearings held in all non-construction certification applications?
No. Parties to a certification application can participate in the "Waiver Program", in which first a Waiver Officer and then, if required, a Labour Relations Officer will contact all of the parties and try to help them resolve the issues in dispute. If the parties reach an agreement on all the issues, the Board will issue a decision without holding a formal hearing.

Are the affected employees notified of an application for certification?
Yes. The Board makes certain that the employer posts Form B-4 - "Notice to Employees of Application for Certification and of Hearing Before the Ontario Labour Relations Board". This ensures that employees are fully informed about the details of the application. The form also provides instructions for employees who wish to make their views known to the Board. However, evidence of objection to the certification of the union will not be considered by the Board if it is presented after the application date.

Who may attend a certification hearing?
Certification hearings are open to the public. Anyone may attend as an observer. Only certain people may take an active part in them, however. They are: representatives of the applicant union; representatives of the employer; any employees (or representatives of employees) who have filed a request to participate before the terminal date; and representatives of any 'intervenor' having an interest in the application.

What is an intervenor?
When an application for certification is received, the Board notifies any other unions which the application or response says represents any employees of the affected employer. If any such union feels that the applicant organization is seeking to represent employees for whom it has bargaining rights, it can file an 'intervention'. This is done on Form A-3 - 'Intervention Before The Ontario Labour Relations Board'. The intervening trade union then gets an opportunity to protect its interests at the hearing. A trade union that does not have bargaining rights for any of the affected employees, but that does have at least one of the employees as a member, may also intervene.

What is the 'terminal date'?
The terminal date is set by the Board in all certification applications. It is normally five to seven working days following the date the application for certification was filed. This is the date by which responses and interventions must be filed. (See page 15 about filing material with the Board).

What happens at a certification hearing?
A wide variety of topics may be discussed. The main issues are generally whether the group applied for forms a 'unit' appropriate for orderly collective bargaining and whether or not the union has sufficient employee support. In addition, the Board must be satisfied that the applicant is a trade union as defined by the Act. (See heading **"The Legal Requirements for Establishing a Trade Union'** on page 11).

Determining the Appropriate Unit of Employees

What is a bargaining unit?
The group of employees that the union is certified to represent is the bargaining unit. (Section 1(1))

Must the bargaining unit always be determined before a certificate is granted?
No. If the Board is satisfied that any dispute as to the composition of the bargaining unit will not affect the union's right to certification, the Board may certify the trade union pending the final resolution of the dispute. This is called "interim certification". (Section 6(2))

How is the bargaining unit determined?
The Board decides the unit of employees that is appropriate for collective bargaining. When a union applies for certification it does so for a unit it claims to be appropriate.

The employer, in turn, gets an opportunity to reply, using Form A-2 - 'Response to Application for Certification Before the Ontario Labour Relations Board'. In this response the employer may propose the same or a different unit. If both trade union and employer propose the same unit, generally it will be accepted by the Board. If, however, different units are proposed, the Board makes the final decision. (Section 6(1))

In determining bargaining units, what rules does the Board follow?
The Board generally has wide discretion, although the Act does place some restrictions. In particular, under certain situations, the Board must find a craft unit to be appropriate. Dependent contractors and people who practice in the professions of architecture, dentistry, engineering, land surveying or law are all entitled to their own separate units as well, unless a majority of them wish to be included in a unit with other employees. With certain exceptions, full-time and part-time employees must be included in the same bargaining unit when the union has majority support in that unit. Security guards must be grouped in a unit separate from other employees if the union or employer makes the request and if their monitoring duties would place them in a conflict of interest. (Sections 6(2.1)-6(6))

What is a craft unit?
Essentially a craft unit is one composed of skilled workers engaged in some trade who commonly bargain together, separate and apart from other employees. A craft union will generally apply to be certified for all employees who practise that trade. Thus, for instance, the United Brotherhood of Carpenters and Joiners of America might seek to be certified for all carpenters employed by a building contractor, while the International Brotherhood of Electrical Workers might apply to represent all electricians working for the same contractor. If successful in their bids, the unions would bargain on behalf of craft units. (Section 6(3))

What requirements must be met before the Board will find a craft unit appropriate?
The employees involved must belong to a distinguishable craft. They must commonly bargain apart from other employees. And the union applying to be certified on their behalf must be a union with a history of representing such employees in a craft unit. The Board may also include in the craft unit persons who usually work in association with these craft workers. (Section 6(3))

What other types of bargaining units are there?
The opposite of a craft unit is an industrial unit. Unions may organize all workers at a particular workplace, or across an entire industry, no matter what their trades. The practice of the Board is to describe bargaining units in terms of classes of employees or of occupational classifications, and not in terms of particular individuals. Standard units recognized by the Board include production units, office units, technical and professional units. In addition, where most of the employees of an employer are organized, the remaining employees may be included by the Board in a 'tag-end' unit even though they may not otherwise be an appropriate bargaining unit by themselves. This is done so as not to deprive these employees of their collective bargaining rights.

What criteria does the Board use in deciding appropriate industrial units?
The Board focuses on the union's proposed bargaining unit. The Board asks itself whether there is a sufficient community of interest in the unit proposed by the union so that the employees can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer.

The primary (though not only) considerations are:

- The desires of the employer and the trade union.
- The community of interest among employees. This involves taking into account such factors as the nature of the work performed, the conditions of employment, and the skills of the employees.
- The organizational structure of the employer.
- The desire not to split the work force of one employer into too many bargaining units.

What happens if an application for certification is made for a craft unit, but the affected employees are already part of a larger industrial unit?
The Board has the power to decide whether or not to 'carve out' a craft unit. Even if all the technical requirements for a craft unit are met, the Board might well decide that a craft unit is inappropriate. In fact, this is most often the case. Generally, the Board will certify a craft union for a craft unit in these circumstances only if the craft employees have not been properly represented by the industrial union.

What geographic limits does the Board place on bargaining units?
If an employer carries on business in only one location in a city or town, the Board will normally limit the unit to that municipality. If business is carried on at more than one location, the Board will often make each place of business a separate bargaining unit. Sometimes, however, the operations at two or more locations are so integrated and the community of interest shared by employees is so complete, that a larger unit covering all locations is desirable.

Bargaining units in the construction industry are treated somewhat differently. Under the Act, the Board is prohibited from determining a unit on the basis of a particular project. Rather, it bases its judgment on geographic areas. To do this the Board has divided most of the province into 32 geographic areas. (See heading **'Construction Industry'** on page 73)

How does the Board determine the bargaining unit when the union is applying to be certified to displace another union?
Generally, the Board will refuse to change the description of the existing bargaining unit.

What about part-time employees?
The Board will put part-time and full-time employees together in one bargaining unit if overall support for the union is 55% or more, or if, following a vote, there is over 50% support from each of the full-time and part-time groups, or if the union could in any other way be certified for each unit separately, or if there is only one full-time or part-time employee. Separate units may be established, however, if either of the full-time or part-time employees are already represented by a union.

These rules do not apply to craft units or to the construction industry. (Section 6(2.1)-(2.3))

Can separate bargaining units be combined into one?
The Board has the power to combine a proposed or an existing bargaining unit with one or more existing or proposed bargaining units. This is so as long as the same union represents each group of employees involved. A union or employer can request a combination of bargaining units by completing and filing with the Board seven copies of Form A-9 - "Application for Combination of Bargaining Units".

When deciding whether to combine the units, the Board considers various factors, including the interests of stable collective bargaining, the reduction of bargaining unit fragmentation, and the potential for serious labour relations problems.

In manufacturing operations, the Board will not combine bargaining units where doing so would unduly interfere with the employer's ability to maintain significant operational or production differences between two or more facilities, or where it would affect the employer's ability to continue to operate viable and independent businesses.

These rules do not apply to the construction industry. (Section 7)

Percentage Support Required for Certification

Once a bargaining unit has been determined, how does the Board decide whether or not to certify the union?
The Board must satisfy itself that the union has sufficient support among the employees in the bargaining unit. It does so by looking at the percentage of employees in the bargaining unit who have become union members or who have applied to become union members. (Section 8(1))

Does the Board always have to determine the final bargaining unit before certifying a union?
No. In certain situations where it is apparent that the dispute about the composition of the bargaining unit will not affect the union's entitlement to certification the Board may issue interim certification. (Section 6(2))

How does the Board find out how many people are in the bargaining unit at the time of application?
It does this by asking the employer to list the employees on a series of schedules supplied to the employer by the Board. The union may 'challenge the list' if it feels the employer has either listed people who are not properly in the bargaining unit or left people off the list who are properly in the bargaining unit. If a challenge is made the Board will normally have one of its labour relations officers conduct an investigation of the employer's records. Then the officer will check the lists supplied by the employer with representatives of both the employer and the trade union. Employees who are not at work on the day the union filed its application are still counted as employees in the bargaining unit if they were at work within the 30 days prior to the application date and will return (or the employer expects them to return) within 30 days after that date. However, if the application relates to the construction industry, the Board generally counts only the employees in the bargaining unit on the application date. (Section 121(2))

Once the Board has found out the number of employees in the bargaining unit, how does it determine how many of them support the union?
The union must file evidence of which employees belong to the union or have applied to belong to the union on or before the application date. Special care is taken to keep this information secret. (See heading, **'Evidence of Union Membership'** on page 28)

What percentage of the employees in the bargaining unit must support the union if it is to gain certification?
Except where the application requests a pre-hearing representation vote (see pp. 35-36), if less than 40 per cent of the employees in the unit are members or have applied to become members of the trade union, the Board must dismiss the union's application. If more than 55 per cent are union members or have applied to become members, then most often the Board will certify the union. If, however, between 40 and 55 per cent have joined or applied to join the union, the Board must conduct a representation vote in which the employees indicate by secret ballot whether or not they wish to be represented by the union. (Section 8)

The Board will then certify the union only if more than half the ballots cast are marked in favour of the union. There is an important exception to these rules. If another union already represents the employees, the Board will automatically order a vote provided the applying union has at least 40 per cent employee support (or 35% in the case of a pre-hearing vote). This is true even when the union applying to be certified has signed up more than 55 per cent of the employees. In such a vote, the employees are given the choice of which union they wish to have represent them. (See Chart, page 27) (Section 8)

What if the employer, or someone acting on behalf of the employer, has contravened the Act so that the employees are afraid to join or vote in favour of the union?
If this has happened and the Board is satisfied that the true wishes of the employees are not likely to be ascertained, it may certify the union. The Act no longer requires the union to show that it has membership support adequate for the purposes of collective bargaining in order for certification without a vote to occur. (Section 9.2)

What happens if a dispute as to whether a person is or is not an employee arises during certification proceedings?
Where the dispute as to employee status is relevant to the determination of the composition of the appropriate bargaining unit or the union's degree of support, the Board may settle the dispute during certification proceedings. For example, there may be a dispute as to whether a person exercises managerial functions so that he or she is not an employee for the purposes of the Act.

In other situations, the Board will certify the union, and leave the parties to resolve the dispute either during bargaining or by making an application to the Board under section 108(2). This section provides for an application to be made to the Board where a dispute as to whether a person is an employee arises during bargaining or during the term of a collective agreement. Under this provision the Board will not determine a dispute as to whether a person is covered by a collective agreement. That must be determined by referring the issue to an arbitrator under the terms of the agreement.

Chart Showing Membership Support Required in a Certification Application

	Percentage support among employees in the bargaining unit as indicated by the number of membership cards or applications for membership submitted in support of the application	How the Board will deal with the application
Normal Certification Procedure	-less than 40% of the total number of persons in the bargaining unit	-application will be dismissed
	-40% to 55% of the total number of persons in the bargaining unit	-a representation vote will be held to determine if a clear majority are in favour of the union
	-more than 55% of the total number of persons in the bargaining unit	-the Board will normally certify without ordering a representation vote, but a vote may still be held if the Board considers it advisable to do so
Special Rules where Applicant requests a pre-hearing vote	-less than 35% of the total number of persons in the bargaining unit	-application will be dismissed
	-35% or more of the total number of persons in the bargaining unit	a representation vote will be held to determine if a clear majority are in favour of the union

Example: If there are 100 employees in the unit that the Board determines is appropriate, the union will need at least 40 valid membership cards or applications for membership to be entitled to a vote, 56 cards to be entitled to automatic certification, and 35 cards to be entitled to a vote under the special pre-hearing vote procedure.

Evidence of Union Support

What evidence must the union submit to the Board?
Unions usually submit applications for membership in the form of cards. Normally, a person applies for membership by signing a card that states that he or she wishes to be represented by the trade union. The Board requires that the application for union membership be in writing, signed by the person applying for membership, dated, and accompanied by the name of the employer, and name, address and telephone number of a union contact person. The signature is checked by the Board against a sample signature obtained from the employer. (Section 8(5), Rule 47)

The Act does not require that any membership fee be paid for a person to be considered a member of a trade union. (Section 105(4.1))

Must the union provide the Board with anything else besides membership applications?
Yes. The union must file Form A-4 - 'Declaration Verifying Membership Evidence Before the Ontario Labour Relations Board'. This form is a statement by a union representative that, to the best of his or her knowledge, information and belief, the documents submitted represent evidence of union membership or applications for union membership of the number of employees indicated. The union must also file a list of employees, in alphabetical order, that corresponds with the membership evidence. (Rule 43)

When must all evidence of support for the union be submitted?
The membership evidence and evidence of application for membership, the declaration verifying membership evidence, and the alphabetical list must be filed on or prior to the certification application date. (Section 8(4), Rule 43)

How far in advance of an application can the evidence of membership or application for membership be dated?
Evidence of union support can become 'stale' due to passage of time. If the evidence is more than one year old, the Board may reject it entirely. If it is six months old, the Board may order a representation vote before certifying the union.

Evidence of membership or application for membership that has been filed with the Board will be returned to the sender or disposed of if an application for certification is not filed within 6 months of the date the Board received the evidence. (Rule 51)

Evidence of membership dated prior to the date upon which a union came into existence will be rejected unless the employees involved later confirm their membership. Undated membership evidence may not be accepted.

If a local is applying to be certified, is it sufficient that employees have joined the parent union?
No. The membership evidence must clearly indicate that the employees have joined the local. If the parent union is applying to be certified, however, evidence of membership in a local of that parent union is accepted.

What about union membership evidence obtained by intimidation?
It will not be accepted.

Board Officer's Role in Certification Applications

What are the functions of labour relations officers appointed by the Board in a certification application?
Labour relations officers gather information for the Board in certification proceedings. In appropriate cases, they will contact or meet with the parties before the hearing to attempt to resolve any issues in dispute and obtain the agreement of the parties to waive a formal hearing before the Board. They will conduct examinations into a person's duties and responsibilities if it is not clear whether the person is an employee, or exercises managerial functions, or is employed in a confidential capacity in matters relating to labour relations. They record information the Board can use in determining the community of interest among employees. This helps decide what the bargaining unit or units should be. They check the accuracy of lists of employees filed by an employer. They provide the Board with information that helps them determine who employs a group of employees. They attempt to settle differences between employers and unions with regard to the bargaining unit.

Where is an examination conducted?
The officer arranges the meeting place. Often the meeting is on the employer's premises. Otherwise, it is held at a nearby location.

What is the procedure at an examination into a person's duties and responsibilities?
The officer will ask questions of the people involved. Representatives of the union and of the employer are then given an opportunity to cross-examine witnesses. The officer and the parties may also call witnesses. The labour relations officer decides whether questions are proper and relevant to the inquiry. The evidence given at the examination is transcribed and issued in the officer's report.

Who makes sure witnesses show up at the examination?
If a person's employment status is being challenged, it is up to the employer to make sure that person is available as a witness. If the person has left its employ, the employer should immediately inform the officer. If a person's employment was terminated before the examination, it is the responsibility of the party that is challenging that person's status to have him or her available for examination. If either the union or the employer wants to call its own witnesses, it must make its own arrangements.

If the status of a number of people has been challenged must each one be examined separately?
Not necessarily. The parties may agree that the evidence of one person or a number of persons in the classification is representative of the duties and responsibilities of all persons in the classification. Even when the parties fail to agree, the labour relations officer may issue an interim report before all persons in the classification have been examined. If this is done, the parties will be given an opportunity to make representations to the Board as to whether it is necessary to examine all persons in the classification. The Board ultimately decides the issue.

What happens after the examination has been completed?
The officer prepares a report for the Board and copies are sent to the parties. People receiving the report have the right to question its accuracy. They can either request a hearing before the Board or forward their views in writing to the Board. (Section 105(2)(g), Rules 37 and 38)

Opposition to the Union by Employees

Can an employee withdraw his or her support from a union after becoming or applying to become a member, but before the union is certified?
By filing 'evidence of objection' with the Board, an employee may, in some circumstances, be able to prevent his or her membership evidence from being relied upon to issue a certificate without a representation vote.

What form must evidence of objection take?
There is no standard form, but it is often in the form of a petition. Whatever form the evidence takes, it must be in writing, signed by the employee or group of employees concerned, dated, and accompanied by the name, address and telephone number of a contact person. The evidence of objection must name the employer and union involved (if known) and state clearly that the employee or employees who have signed it are opposed to the applicant union being certified. (Rule 47)

Do the union and the employer see the evidence of objection?
No. The employer and the union are both informed that evidence of objection has been submitted. They are also told how many people have signed the document. They do not see it, however, nor are they told who signed it.

When must the evidence of objection be submitted?
Evidence of objection must be filed with the Board on or before the application date stated on Form B-4 - "Notice to Employees of Application for Certification and of Hearing", which the employer is required to post. If the evidence of objection is sent to the Board by ordinary mail or any other means, it must be received by the Board no later than the application date. If it is sent by registered mail it is sufficient if it is mailed by the application date, as long as the Post Office verifies in writing the date it was sent. If the evidence is filed after the application date, it will be disregarded by the Board. (Section 8, Rule 8)

Any evidence of objection which has been filed with the Board will be returned to the sender or disposed of if no relevant application for certification is filed within 6 months of the date the Board received that evidence. (Rule 51)

What is the effect of evidence of objection?
The effect of voluntary evidence of objection is limited to causing the Board to order a representation vote where it would otherwise certify the union without a vote because the union filed membership evidence on behalf of more than 55 per cent of the employees in the bargaining unit. In cases where the union, in any event, was only entitled to a vote, the evidence of objection has no effect. Because of this, evidence of objection does not affect a pre-hearing vote application nor does such evidence affect proceedings where the union has filed evidence of union support for less than 55 per cent of the employees in the unit. (Section 8)

Can an employer suggest that employees file evidence of objection, or assist in its preparation?
No. The Board will reject any evidence of objection that is not clearly a voluntary expression of the signing employee or employees, entirely free from employer influence.

How do you prove that evidence of objection does not have management support?
If the evidence of objection will affect the certification process by causing the Board to order a representation vote, the Board will call upon the objecting employees to prove that the evidence is voluntary.

A representative of the signing employees must appear and call witnesses to testify under oath about how the evidence of objection originated (whose idea it was, who drafted it and where) and about the manner in which each of these signatures was obtained. This means that evidence must be given about the circumstances under which each employee signed the evidence of objection by someone who was present at the time. Through all this, the Board makes certain that the names of the employees contained in the evidence of objection are not revealed to the employer or the union. Reference is made only to a number placed beside each of the signatures by the Board. No member of management should be present when employees are asked to sign the evidence of objection, and it is essential that employees do not have the impression that management will be shown or told who signed and who did not. Signatures should not be obtained on work-time, and in fact it is best that signatures be obtained away from the premises of the employer altogether, if that is possible.

The persons who present the evidence at the hearing will be questioned by the Board, and may be questioned by the representatives of the union and the employer. If at the end of the enquiry the Board is not satisfied that the evidence of objection is a voluntary expression of the employees who signed, it will be disregarded.

What can a union do if it has evidence indicating that the evidence of objection is not, in fact, a voluntary expression of the wishes of the signing employees?
The union should immediately inform the Board, in writing, detailing its charges and the facts it has uncovered. Then, at the hearing, a union representative will be given the opportunity to cross-examine the people who testify on behalf of the objecting employees. The union may also present evidence, through its own witnesses, about the evidence of objection.

Representation Votes

What is a representation vote?
A representation vote is a vote conducted by the Board among the employees in a bargaining unit in order to determine whether they wish to be represented or to continue to be represented by a trade union. While representation votes may be ordered in a number of proceedings, including termination applications, successor rights applications and jurisdictional disputes, by far the majority of representation votes are held in relation to certification applications.

How is the vote conducted?
A returning officer is sent out by the Board to conduct the vote. Each party is given an opportunity to select one scrutineer for each polling place. The scrutineers make sure that everyone who votes is entitled to do so. Usually the ballots are counted by the returning officer, in the presence of union and employer representatives, immediately after the voting is completed. However, the Board may order the ballot box sealed after the vote in certain cases where bargaining unit disputes exist. In such cases, the ballots will be counted only after such disputes have been resolved.

Who may take part in a representation vote?
All employees in the bargaining unit are entitled to vote if they were employees both on the day the Board ordered the vote as well as on the day of the vote itself. Employees who are absent from work because of temporary lay-off, pregnancy leave, or workers' compensation are also eligible to vote. The employer must give all eligible employees an opportunity to vote during their working hours.

What choices are employees given?
If the bargaining unit is not represented by another union the employees have a choice between the applicant union and no union. If, however, there is already a union on the scene, employees are given a choice between the two unions.

What about spoiled ballots?
Spoiled ballots are not counted. A ballot is only spoiled if it does not clearly indicate the choice of the voter, or if the person voting has put his or her name or some other identifying mark on the ballot.

What if someone believes the vote was not conducted properly?
After the vote the returning officer issues a report to the employer and the union. Copies are also posted at the workplace for employees to read. The report states how objections can be made to the Board about the vote. If the Board decides that irregularities have occurred, it can set aside the vote, and direct a new vote.

What can the union do if it believes a vote will not disclose the true wishes of the employees because of employer interference?
It can apply to the Board to be certified without a vote or, as has happened in a few cases, to be certified even though it has lost the vote. The Board can do this if it finds that the employer or someone acting on the employer's behalf has violated the Act and the Board agrees that the true wishes of the employees are not likely to be revealed by a vote.

This could happen where the employer has either threatened employees with the loss of benefits or loss of jobs if the union is successful, or promised them increased benefits or higher wages if the union loses the vote. Even illegal anti-union statements by an employer may be sufficient. The Board is primarily concerned with the effect that the employer's conduct has on the employees' ability to freely choose whether or not they wish to be represented by a union.

The Act does not require the union to show that it has membership support adequate for the purposes of collective bargaining in order for certification without a vote to occur. (Section 9.2)

What is a pre-hearing vote and when is it used?
A pre-hearing vote is a representation vote that is taken before the hearing concerning union status, the bargaining unit, etc. is held. It is intended to provide employees with a means of having a quick vote in order to avoid the delays that sometimes accompany a hearing. The union must demonstrate that it has the support of 35 per cent of the employees in the unit before it is entitled to a pre-hearing vote. Occasionally, after the vote is taken the ballot box may be sealed and the votes counted only after the hearing when all the outstanding issues have been settled. A pre-hearing vote may not dispense with a hearing but merely allows employees to register their vote before a hearing takes place. (Section 9)

How are pre-hearing votes conducted?
Generally, they are conducted in much the same way as representation votes. Before the vote, a labour relations officer confers with the employer and the union to decide who is eligible to vote. Where, based on the information provided by the officer, it is satisfied that at least 35 per cent of the employees eligible to vote are union supporters, the Board will order a vote. Occasionally the ballot box will be sealed following such a vote, and the ballots not counted until after a hearing.

Negotiation of Collective Agreements

How are negotiations for a collective agreement begun?
If a trade union has just been certified or voluntarily recognized, it will usually give the employer written notice of its desire to bargain. If the employer and the union are already bound by a collective agreement, then the union may give notice to bargain within the 90 days before the agreement is due to expire, or during any other time period specifically set out in the agreement. In either case, the union and the employer must meet within 15 days from the giving of notice, unless they agree to some other time period. (Section 14, 15, 54).

What can one side do if the other side refuses to negotiate, or appears not to be negotiating in good faith?
It can complain to the Ontario Labour Relations Board and seek relief. The Board can issue remedial orders, including a direction that the offending party (employer or union) bargain in good faith. The Board can also settle some of the terms of the collective agreement itself if other remedies would not adequately address the effects of the bad faith bargaining. (Section 91(4)(d))

What happens if, during negotiations, the employer and the union cannot agree on the terms of a collective agreement?
Either the employer or the union may ask the Minister of Labour to appoint a conciliation officer. This officer will then try to help them reach an agreement. (Section 16)

What if they cannot reach agreement even with the help of a conciliation officer?
The conciliation officer informs the Minister of Labour. The Minister may then appoint a three-person conciliation board (Section 19). This seldom happens, however. Instead, the Minister will issue a report informing the union and the employer that he or she does not consider it advisable to appoint a conciliation board. This is generally referred to as a 'no-board report'. (Section 19(b))

What happens after the Minister issues a no-board report?
After a given period of time, and provided there is no collective agreement in operation, the union is in a legal position to call a strike or the employer to lock-out its employees.

At any time after the no-board report, either the employer or the union may apply to the Conciliation and Mediation Services Branch of the Ministry of Labour for the appointment of a mediator to help them reach agreement. The appointment of a mediator has no effect on the time period for a legal strike or lock-out.

Can the employer request a vote of employees on its final offer?
Any time before or after the commencement of a legal strike or lock-out, the employer may request the Minister of Labour to direct a vote of the employees in the bargaining unit as to their acceptance or rejection of the employer's final offer on all matters remaining in dispute. Except in the construction industry, upon the receipt of such a request the Minister is obligated to direct such a vote to take place. Neither the request to the Minister nor the conduct of the vote affect the time periods set out in the Act. (Section 40)

When is a strike or lock-out legal?
A strike or lock-out is never legal during the term of a collective agreement. When no agreement is in operation a strike or lock-out is legal beginning on the 17th day after the Minister mails the no-board report. For example, if the Minister mails the no-board report on August 1, the parties can legally strike or lock out on August 18. There is some confusion about this because the Act states that the period is 14 days after the release of a no-board report. The report is not deemed to have been released, however, until the second day after it was mailed. This extends the period to 16 days, and means that a strike cannot legally start until the beginning of the 17th day. (Sections 74(2) and 115(3))

Does the law require that a strike vote be conducted before a strike can take place or that there be a ratification vote before a collective agreement is signed?
No. Whether or not a strike or ratification vote is required is determined by the constitution of each union. A union member may be able to enforce any provision in a union constitution calling for a strike or ratification vote either through procedures provided in the constitution itself or in the courts.

However, the Act does require that if there is a strike vote or ratification vote it must be by secret ballot and that people eligible to vote have ample opportunity to do so. All employees in the bargaining unit, whether or not they are members of the trade union, are entitled to participate in such a vote. (Section 74)

The Minister of Labour also has the discretion where he or she is of the opinion that it is in the public interest to do so, to require at any time after the commencement of a strike or lock-out that a vote be held in order to give the employees an opportunity to accept or reject the employer's offer last received by the trade union. (Section 39)

Where anytime before or after the commencement of a strike or lock-out, an employer requests that a vote be conducted of its employees as to the acceptance or rejection of the employer's offer last received by the union, the Minister is required to (except in the construction industry where the Minister has a discretion) direct that such a vote be conducted. (Section 40)

Are strikers still employees?
Yes. And it is illegal for them to be fired only because they are on strike. (Section 1(2))

When does a strike come to an end?
In almost all cases a strike comes to an end when the employer and the union sign a collective agreement, and the striking employees return to work.

Do all employees covered by the Labour Relations Act have the right to strike?
No. Employees of hospitals and nursing homes do not have the right to strike. Instead, differences between the employer and the union are settled by binding arbitration. They are covered by the Hospital Labour Disputes Arbitration Act.

The Labour Relations Act also gives the union and the employer the right to agree that the matters about which they are negotiating be referred to an arbitrator or board of arbitration, who will decide, after hearing arguments from both sides, what the terms of the collective agreement will be. When a union and an employer agree to submit to arbitration, strikes and lock-outs are forbidden both before and after the arbitration decision. Neither the union nor the employer is allowed to change its mind and decide to call a strike or engage in a lock-out. (Section 38)

Do employees have any right to get their jobs back after they have been on a lawful strike or have been locked-out?
Yes. If, at the end of a lock-out or lawful strike, the union and the employer do not agree about the terms for reinstating employees, an employer is required to reinstate employees to the positions they held before the strike or lock-out began, provided that enough work is available. Otherwise, the employer must reinstate employees as work becomes available in accordance with any seniority-based recall provisions in a collective agreement, or, if there are none, in accordance with an employee's length of service. For the purposes of recall, the level of seniority or length of service is to be determined as of the date the strike or lock-out began. (Section 75)

First Contract Arbitration

Where parties have engaged in negotiating a first collective agreement and have exhausted the conciliation procedures, either party can apply to the Minister or the Labour Board to have the agreement settled by private binding arbitration.

If a request is made to the Minister, access to private arbitration is automatic 30 days after it became lawful for employees to strike or for the employer to lock-out its employees.

A union or employer can also, any time after a conciliation board report or a "no-board" report is released, ask the Ontario Labour Relations Board to direct that the agreement be settled by private arbitration. This is done by completing and filing with the Board seven copies of Form A-15 - "Application for Direction that a First Collective Agreement be Settled by Arbitration". The Board will make a direction where it determines that the process of collective bargaining has been unsuccessful because of (a) the refusal of the employer to recognize the bargaining authority of the trade union; (b) the uncompromising nature of any bargaining position adopted by the responding party without reasonable justification; (c) the failure of the responding party to make reasonable or expeditious efforts to conclude a collective agreement; or (d) any other reason the Board considers relevant. (Section 41(2))

Upon the making of a direction by the Board that a first collective agreement be settled by arbitration, strikes and lock-outs are prohibited and any strike or lock-out in progress must be terminated. (Section 41(13), 41(13.1))

Strike Replacement Workers

During a strike or lock-out, an employer has the right to carry on business. However the Labour Relations Act places certain restrictions on the use of replacement workers during the labour dispute. These restrictions may only be invoked if the union has received a mandate to strike from 60 percent of those who participated in a secret ballot vote. The restrictions include:

1. The employer cannot use the services of any employee in the bargaining unit that is on strike or is locked-out.

2. The employer cannot hire new employees or volunteers to perform the work normally done by the bargaining unit employees. However, existing non-bargaining unit employees who work at the location of the labour dispute may do bargaining unit work at that location only. So can management staff, who can also be moved between locations within a bargaining unit in order to work during a strike or lock-out.

3. Non-bargaining unit employees can legally refuse to perform bargaining unit work during a strike or lock-out. Under the Labour Relations Act, employers may not penalize such persons for such a refusal.

Are there exceptions to the replacement workers provisions to protect the delivery of essential services?

Yes. Replacement workers may be used during a strike or lock-out in order to:

1. maintain certain essential human services (including detention centres, residential care for vulnerable persons, emergency shelters, ambulance and emergency communications services, and child protection services);

2. provide for the delivery of services necessary to prevent danger to life or safety, or serious property or environmental damage.

Employers who provide essential work are required to notify the union of their intention to use replacements before the strike or lock-out commences and first allow bargaining unit members the opportunity to perform this work.

Disputes on any of these issues will be settled by the Board on an expedited basis.

Term of The Collective Agreement

How long does a collective agreement run?
The term is something that the union and the employer must agree upon when negotiating the agreement. The law only requires that a collective agreement have a minimum term of one year. (Section 53)

Can a collective agreement be changed or amended?
The union and employer can agree to change any of the agreement's terms, but not its length of operation. (Section 53(5))

What if the union and the employer want to terminate their agreement early so that they can enter into a new collective agreement?
They can jointly apply to the Ontario Labour Relations Board for permission. There is no standard form for this. The Board will generally grant the application if employees are told of the application and none object. The major concern of the Board in such applications is that an early termination will not affect the position of another union which might intend to apply for certification in the last two months of the existing agreement. (Section 53(3))

What rights do employees have after a collective agreement has expired?
If a notice to bargain has been given to the employer, the terms of the expired collective agreement will continue to apply. This includes any arbitration provisions. Once the union is in a legal strike position, the employer is free to alter the conditions of employment, except the provisions in the previous collective agreement respecting protection against discharge or discipline without just cause. The union and the employer may agree to continue the operation of the collective agreement while they are bargaining for its renewal. (Sections 43.1, 53(2) and 81)

Union Security (Dues and Membership)

Who is covered by a collective agreement?
All employees in the bargaining unit as set out in the collective agreement itself. This bargaining unit may, if both the union and the employer agree, be somewhat different from the bargaining unit the union was originally certified to represent. Also, the bargaining unit may, if agreed upon by the employer and the union, change from one collective agreement to the next.

Can an employee covered by a collective agreement be obliged to join or pay dues to the union?
The fact that a union becomes certified does not, by itself, mean that all employees in the bargaining unit must join the union. However, except in the construction industry, on the execution of a collective agreement, at the request of the union all bargaining unit employees will be required to pay union dues (Section 44). The employer and the union may agree to include union membership requirements in a collective agreement as a condition of continued employment. This is generally known as a 'union security clause'.

What are the main types of union security clauses?
The clause can take many forms, but there are five basic types:

The Union Shop. This is the most common form of union security arrangement. All present and future employees must become and remain union members.

The Closed Shop. Under this arrangement, only members of the union may be hired by the employer. The closed shop is found most frequently in the construction industry.

The Agency Shop. This clause does not require employees to join the union, but non-members must pay the union an amount equal to the dues paid by members. This is a service charge for the benefits they derive from having the union act as their bargaining agent. The union has a legal obligation to represent all persons in the bargaining unit, whether or not they are members. In Ontario, the agency shop arrangement is commonly called "the Rand formula" and must be included in a collective agreement at the request of the union.

Maintenance of Membership. Employees need not join the union, but those who are already members must maintain their membership. This form of union security is not used very often.

Voluntary Checkoff. Employees need not join the union, but the employer, at the written request of the employee, must deduct regular union dues from the wages of an employee and remit them to the union. It is not unusual for a collective agreement to combine two or more of these union security clauses. For instance, a collective agreement could state that new employees must join the trade union, but that employees who were with the employer prior to the negotiation of the collective agreement need not. It could also state that any exempted employees who did join the union must maintain their membership, or that any who did not join must pay the union an amount equivalent to the union dues.

What happens to employees who do not join the union when it is a condition of employment under the collective agreement?

The union could ask the employer to discharge them. If the employer fails to do so the union could file a grievance. Employees are protected, however, if union membership has been denied them or if they have been expelled from the union only because they supported a rival union, engaged in reasonable dissent within the union, refused to pay unreasonable fees or assessments, or were discriminated against by the union's application of its membership rules. (Section 47)

What if an employee objects to union membership for religious reasons?

In certain situations, the employee may be exempted from union membership and the payment of union dues provisions in a collective agreement. For an employee to be eligible for the exemption, the employee must have been employed prior to negotiation of the union security clause. A person cannot take a job at a firm where union membership is already a condition of employment, and then apply for the exemption.

An application for religious exemption may be made only during the term of the first collective agreement in which the union security requirement is included. A person applies for the religious exemption by completing and filing seven copies of Form A-53 with the Board. Both the trade union and the employer are informed of the application, and may file responses. The Board then holds a hearing to determine whether or not the employee is entitled to exemption for religious reasons. The employer and the union may participate at the hearing if they have previously filed responses. Employees who are exempted from the payment of union dues must pay an equivalent amount to a charity. (Section 48)

Grievance and Arbitration

What if an employee or a trade union feels that the employer is not following the terms of the collective agreement, or if there is a disagreement about the meaning of part of the collective agreement?
In such a situation, the employee or the union may file a 'grievance'. The grievance procedure is set out in the collective agreement itself. Normally, it involves three or four steps. At each step more senior people from both the union and the employer try to settle the grievance. The collective agreement will often provide for a time limit within which the grievance must be commenced (usually a certain number of days after the event giving rise to the grievance). If the employee or union does not file the grievance within this period, it may be dismissed. An arbitrator has the power to extend the time limits, but only if the other side's position will not be prejudiced. (Section 45(8.3))

Can the employer file a 'grievance' if the union is not complying with the agreement?
Yes. Such grievances are processed in the same general way as union or employee grievances.

What if the union and the employer cannot settle a grievance?
The grievance may then be referred to an arbitrator or board of arbitration. The method for doing this should also be set out in the collective agreement. An arbitrator performs a function similar to a judge or court in that she or he can make a binding decision resolving the matters in dispute between the parties. Collective agreements typically provide that grievances be heard and decided by one person acting as a sole arbitrator or by a three-person arbitration board. The union and the employer each select a member, and those two members, in turn, agree on a chair.

What if either the union or the employer refuses to appoint a representative to an arbitration board, or if agreement cannot be reached on the selection of a chair?
If the collective agreement itself does not provide for such a situation, then the Minister of Labour can be asked to make whatever appointments are necessary. If the right of the Minister to make such an appointment is challenged, the Minister may refer the issue to the Ontario Labour Relations Board. (Sections 45(4),109(1))

What happens if a collective agreement fails to provide a grievance procedure or the procedure is inadequate?
Every collective agreement is deemed to contain an arbitration provision. If, in the opinion of the Board, any part of an arbitration provision is inadequate, the Board may modify the provision. (Section 45(2),(3))

Is the decision of an arbitrator or arbitration board binding?
It is final and binding. If it is not obeyed, the decision can be filed with the Ontario Court (General Division) and can be enforced as a decision of that court. Failure to abide by an arbitration decision can be contempt of court. (Section 45 (10),(11))

Does the Ontario Labour Relations Board ever do arbitrations?
This is possible only in the construction industry. There, either the union or the employer may refer questions concerning a construction industry collective agreement to the Board for a binding decision similar to that which would otherwise be made by an arbitrator in industries outside the construction field. The Board must hear these cases within 14 days of their filing. (Section 126)

What can an employee do if she or he feels the union did not handle the grievance properly?
As the exclusive bargaining agent of the employees, the union has the right to settle any grievance, to decide whether a grievance should go to arbitration, and to decide how a grievance should be presented at arbitration. The union need not take every grievance through to arbitration simply because an aggrieved employee requests that this be done, but the union must honestly consider the matter and not act in a manner that is arbitrary, discriminatory, or in bad faith.

If an employee is unhappy with the way the union has handled the grievance she or he might be able to appeal the union decision internally if the union's rules or constitution allow such an appeal. Some union constitutions state that if the union decides not to take an employee's grievance to arbitration, the employee may appeal to the membership of the union local. Then a vote of the membership determines whether or not the grievance should go to arbitration. Apart from any such internal union appeal, an employee has no general right to appeal a union's decision. The Ontario Labour Relations Board will not generally deal with an employee's complaint about the manner in which the union handled a grievance, except when the union's conduct amounts to a breach of the duty of fair representation discussed on page 56. (Section 69)

Can employees force an employer to live up to the terms of a collective agreement by going on strike?
No. It is illegal to strike during the term of a collective agreement. Such a strike would mean that the employees themselves are not living up to the terms of the agreement which must contain a no-strike clause. Instead, employees should make use of the grievance and arbitration procedure contained in the agreement. (Section 43, 76, 78)

What if the employer and the union disagree about something not covered by their collective agreement?
The Minister can appoint a special officer to confer with the union and employer and try to help them resolve the problem. (Section 36)

How can the arbitration process be expedited?
A party may request, in writing, that the grievance be referred to a sole arbitrator appointed by the Minister. Such a request may be made only after the grievance procedure under the collective agreement has been exhausted, or 30 days (14 days where the grievance relates to a discharge) have elapsed since the grievance was first brought to the attention of the other party, whichever comes first. A request under the provision may be made even though there is an arbitration clause in the collective agreement, except that it must be made within the time permitted, if any, by the agreement for referral of a grievance to arbitration.

An arbitrator appointed under this provision is required to commence a hearing within 21 days after the receipt of the request by the Minister. The arbitrator's fees and expenses must be borne equally by the parties (Section 46)

Further information about the expedited arbitration process and application forms can be obtained from the Ministry of Labour, Office of Arbitration, 400 University Av., 16th floor, Toronto, Ontario, M7A 1T7 (416) 326-1300.

What if the union or the employer wants to try mediation before going to arbitration?
Where one party requests and the other does not object, the Minister can appoint a settlement officer who will try to help the parties settle the grievance before proceeding to arbitration. (Section 45(4.1), 46(6))

It is also possible for the parties, at any time, to agree to refer a grievance under the collective agreement to a mediator-arbitrator instead of to an arbitrator. If the parties are unable to agree on a mediator-arbitrator, they can request the Minister to make the appointment. The mediator-arbitrator will attempt to assist the parties to settle the grievance and if unsuccessful, will determine the grievance by arbitration. (Section 46.1)

Interference With Rights Conferred by the Act

What prevents an employer from interfering with its employees' right to join a union?
The Labour Relations Act protects the right of employees to join a union. It states that no employer may interfere with the formation or selection of a union. Among other things, this means that an employer cannot try to influence its employees unduly.

At least two types of employer activity are regarded as undue influence. One is promising benefits to employees if they do not join a union. An employer can point to its past and present policies, but cannot make promises about the future. The second prohibited activity is making threats against employees. This includes threats of closing down, of moving the firm's facilities elsewhere and of ending certain employee benefits. (Generally, Sections 65, 67 and 71)

Similarly, a trade union cannot resort to intimidation to compel anyone to join the union or engage in an unlawful strike. Nor can it unlawfully interfere with persons exercising their rights under the Act. (Sections 71, 80)

Does this mean that an employer cannot make its feelings about unionization known to its employees?
No. The employer has the freedom to express its views as long as it does not use coercion, intimidation, threats, promises or undue influence.

An employer that wants to make its feelings known must use extreme caution. It must watch not only the content of what is said but also the way in which it is said. For example, in some situations a letter to employees posted on a bulletin board may not be as coercive as calling employees together in a 'captive audience' situation. (Section 65)

What can the union do if an employer does use undue influence to try to persuade employees away from the union?
The union can ask the Board to certify it without a vote. If the Board feels that a vote is not likely to disclose the true wishes of the employees because of undue coercion, it will grant certification. The Board must find that the employer's conduct violated the Act before it will certify a trade union in this way. (Section 8, 9.2)

What if the employer tries to gain control of the union rather than oppose it?
An employer is forbidden from supporting a union in any way. If a union has had employer support it will not be certified. (Section 13, 65)

What can be done if an employer fires or in some other way penalizes an employee because the employee is a union supporter?
It is illegal for an employee to be fired or penalized for this reason. If this happens, the employee or the union may file a complaint with the Board. This is done by submitting seven copies of Form A-35 - "Application Under Section 91 of the Act". (Sections 91 and 65, 67, 71)

The trade union can ask the Ontario Labour Relations Board to "expedite" its hearing. If the Board receives such a request, it will begin its hearing within 15 days, will sit on consecutive days from Monday to Thursday each week until the hearing is completed, and will make a decision within two working days after the end of the hearing. A union can request an expedited hearing by completing and filing with the board seven copies of Form A-61 - "Request to Expedite Hearing". Before filing the application with the Board, the union must also deliver to the employer a copy of the completed Form A-61, Form A-35 to which the request for expedition relates, and a blank copy of Form A-36 - "Response to Application under Section 91 of the Act" which the employer will use to respond to the application. (Section 92.2, Rule 94 and 97)

What happens when such an application is made?
Normally, the Board will send out one of its labour relations officers to see if a settlement can be worked out. If not, the Board will either hold a hearing or dismiss the application without a hearing if it is clear that it is without legal foundation. At the hearing the onus will be upon the employer to prove that the discharge was proper and it will be required to show that the person was fired for some reason other than union activity before the Board can dismiss the application. The employer will be required to give an explanation for the discharge. Any doubt as to the motive with which the employer acted will be resolved in favour of the employee. (Section 91(5), Rules 3-24)

The key issue is whether the employee was fired for exercising rights under the Labour Relations Act. **The Board does not rule on the 'fairness' of the firing.** The grounds for firing an employee might exist, but the actual firing can be unlawful if these grounds were the excuse for the firing and not the reason. On the other hand, a petty or unfair reason for discharging an employee will not be a violation of the Labour Relations Act, if that, rather than the employee's union activity, was the real reason for the firing.

What happens to an employee if the Board decides that she or he was fired for union activity?
The Board can order the employee's reinstatement with back pay and interest. The amount of this back pay will be decreased by any amount the employee earned at another job between the time of the discharge and the reinstatement. If the employee did not look for other employment, the back pay awarded may be decreased by the amount that could have been earned if the employee had looked for a job.

If an employee does not want to go back to work for her or his former employer, the Board will not order reinstatement, but may order that the employee be reimbursed for lost wages until another job is found. The Board may also require the employer to sign and post notices stating that it was found in violation of the Labour Relations Act and undertaking to comply with the Act in the future. Other remedies such as union access to employees on company time and company premises, union access to employee bulletin boards, etc. have been awarded too. (Section 91(4))

Is an employee protected if fired for taking an active role in the union at times other than during an organizing campaign?
Yes. Any actions taken against an employee because of union activity are illegal. If an employee has a remedy under a collective agreement, however, the Board will normally refuse to consider such an application. Instead, the employee should file a grievance.

Do employees have the right to join a trade union during working hours?
Generally speaking, no. This should be done outside working hours. An employee is not prohibited from getting other employees to sign union cards before work or during a break, however. Nor can an employer punish or dismiss employees merely because they have signed union cards during working hours. The employer can, however, take appropriate disciplinary action if the employees' union activities begin to disrupt its business operations. Union organizers who do not work for a particular employer do not have the right to go onto that employer's property to try to get employees to join their union. The only exception to this is if the union gets a Board order permitting its organizers to have access to the property. This could happen in cases where the employees live on property either owned or controlled by the employer, such as in remote logging and mining camps. (Section 72, Section 11)

Employees and unions also have access to "third party" property that is normally open to the public for organizing (as well as picketing) purposes. Shopping malls and industrial parks are examples of "third party" property. The organizing (and picketing) activity is permitted only at the entrances and exits to the actual workplace. The Board has the power to restrict these activities if they cause undue disruption (Section 11.1). A party can request the Board to expedite its hearing into an application regarding such access. (See the heading "Expedited Proceedings" at page 55)

What other acts by an employer are unfair labour practices?
Other offences include:

-- Discharging or disciplining an employee without just cause in the period after a union's certification or voluntary recognition and before the making of a first collective agreement. (Section 81.2)

-- Changing the terms and conditions of employment without the approval of the union after the union has applied for certification and before one of the following events has occurred: 1. the application has been dismissed; 2. a collective agreement has been signed; or 3. the union is in a legal strike position. This also applies where the union and the employer are bargaining for a new agreement following expiry of an old one, but before the union is in a legal strike position. (Section 81)

-- Trying to make it a condition of employment that a person not join a trade union. (Section 67(b))

-- Bargaining with one union when another union holds the bargaining rights. (Section 68)

-- Using intimidation or coercion to compel an employee to stop exercising any rights under the Labour Relations Act. (Section 71)

This is not a complete list. There may be other conduct which violates the Act.

What can the union do if the employer commits any of these offences?
The union, and in some cases the individual, can bring an application under section 91 of the Act and ask the Board for an order forbidding the employer to continue the unfair practice or to compensate the union or employee for any damage done by the unfair practice. This is done by filing seven copies of Form A-35 with the Board.

Can there be prosecution for contraventions of the Act? Yes. An application can be made to the Ontario Labour Relations Board for permission to start quasi-criminal proceedings against the employer. When considering such applications for consent to prosecute, the Board does not require the applicant to actually prove its case. The Board does, however, require the presentation of evidence that might be found by a provincial court judge to establish a violation of the Act. Even if the Board decides that a breach of the Act has taken place, it may still refuse to grant its consent to prosecute if no useful purpose would be served by granting it. (Sections 98, 99, 100, 101 and 103)

Interim Orders

What is an interim order?
An interim order is an order or a direction that the Board makes on a temporary or "interim" basis before a final decision in a case has been reached. An example is an order from the Board that an employer reinstate an employee who the union says has been discharged contrary to the Act, pending the final decision in an unfair labour practice complaint.

In what situations are interim orders available?
Interim orders are available in any type of case that is before the Board or which will be coming before the Board. Any party in a case can ask the Board for an interim order.

How is a request for an interim order made?
By completing and filing with the Board 7 copies of Form A-40 - "Application for Interim Order under Section 92.1 of the Act". A copy of the application that relates to the interim order request must be filed with the Board at the same time.

Before filing the application with the Board, the applicant must deliver to the responding party:

a) a copy of the application for an interim order,
b) a copy of the application which relates to the interim order application, and
c) a copy of Form A-41 - "Response to Application for Interim Order under Section 92.1 of the Act".

The responding party has 2 days to respond to the application. This is done by completing the Form A-41 and delivering it to the applicant, and then filing 7 copies of it with the Board.

Interim order applications and responses must include one or more declarations stating what harm will occur if the interim order is or is not granted, all of the facts which the applicant or responding party is relying on, and all representations which support the applicant's or responding party's position. The Board may decide the application without holding an oral hearing, so it is important that all of the relevant information is included in the application and response.

The Board "expedites" interim order cases. See the heading "Expedited Proceedings" on page 55.

Expedited Proceedings

The Board automatically expedites certain kinds of cases. This means that the Board commences its hearings within a short period after receiving an application, and that hearings continue on consecutive days from Monday to Thursday until the case is finished. Cases that are automatically expedited include applications for certification and for termination of bargaining rights, most discharge cases, applications for interim orders, jurisdictional dispute complaints, and first contract applications under section 41 of the Act.

In addition, certain kinds of cases can be expedited on request.

What types of cases can be expedited on request?
If the trade union makes a request, the Board will expedite:

- unfair labour practice complaints under section 92.2 of the Act.

Both the union and the employer can ask the Board to expedite cases on:

- applications and complaints with respect to organizing and picketing on third party property under section 11.1 of the Act.
- applications and complaints with respect to replacement workers under sections 73.1 and 73.2 of the Act.
- complaints with respect to unlawful strikes and lock-outs under sections 94, 95 and 137 of the Act.

How is a request for expedition made?
A party who is entitled to request an expedited hearing may do so by completing and filing with the Board 7 copies of Form A-61 - "Request to Expedite Hearing". The request must also be accompanied by the completed application. Before filing the forms with the Board, the party who makes the request for expedition must deliver to the other party:

a) a copy of the request for expedition,
b) a copy of the application or response which the request seeks to expedite, and
c) (If the party who makes the request is the applicant in the main application), a blank copy of the form which the the responding party uses to respond to the main application. (Rules 94-108)

Union's Duty of Fair Representation

What is the nature of the union's duty?
The Labour Relations Act imposes a duty upon a trade union to fairly represent all of the employees in any bargaining unit for which it has bargaining rights, whether or not the employees are union members. It is a violation of the Act for a union to represent employees in a manner that is arbitrary, discriminatory or in bad faith. If, for example, an employee's complaint concerns the alleged mishandling of a grievance, a breach of that duty will not be established if the employee simply shows that the union could have, or even should have, treated the grievance differently. It is **not whether the union was right or wrong** that is the concern of the Board, **but whether the union's actions were motivated by bad faith, whether it was discriminating against the employee or whether it acted in an arbitrary manner.** For example, the Board has found that a union acts arbitrarily when it **completely ignores** a grievance or where it treats a matter in an indifferent or perfunctory fashion. However it is not arbitrary for a union to put its mind to the complaint or grievance and honestly decide not to take the complaint or grievance further.

May a trade union refuse to process a grievance or to refer it to arbitration?
A trade union is entitled to make decisions that may adversely affect some employees in the bargaining unit as long as it is not acting on improper motives, and honestly considers the matter.

A trade union is entitled to settle or refuse to process a grievance provided it does not act in a manner that is arbitrary, discriminatory or in bad faith. Indeed, collective agreements often contain provisions requiring the parties to meet and endeavour to settle complaints or grievances short of arbitration. A union is **not required** to process a grievance or refer it to arbitration simply because an employee feels that he or she has a 'good' case or 'wants her or his day in court'. The union is entitled to consider many factors, including the merits of the grievance, the relative chances of success and the interests of the bargaining unit as a whole, in determining how it will deal with an employee's grievance or complaint. Union officials may make honest mistakes or exercise poor judgment, but these occurrences may not in themselves be a violation of the Labour Relations Act.

Does the Board resolve the merits of an employee's grievance when the union refuses to refer it to arbitration?
No. While the merits of the grievance may be relevant in assessing the trade union's conduct, the Board will not resolve the merits of the grievance. This is a matter for a board of arbitration or arbitrator established in accordance with the terms of the collective agreement under the Labour relations Act. However, when the union is found to have breached the Act, the Board may refer a grievance to arbitration.

What can be done if an employee feels the union has acted contrary to its duty?
It is not necessary for an employee to be a union member to file a complaint against a union under the Act: any employee in the bargaining unit who is subjected to union treatment that is arbitrary, discriminatory or in bad faith may do so. An employee who thinks that the union has violated its duty may submit a complaint to the Board by filing seven copies of Form A-35 - "Application Under Section 91 of the Act.

Can an application be filed at any time?
There is no statutorily prescribed time within which an application must be filed. However, once a person finds out about any improper conduct, the application must be filed promptly. Where there is extreme delay, the Board may refuse to hear a complaint. (Rule 16)

What happens after a complaint is filed?
When an application is filed, a labour relations officer will normally be sent out by the Board to meet with the employee and the union and try to have them settle the complaint. If no settlement is reached, the Board will hold a hearing to deal with the allegation made by the employee. At the hearing, the employee must prove that the union violated the Labour Relations Act by establishing that it acted in a manner that was arbitrary, discriminatory or in bad faith. This is normally done by leading evidence to prove the allegations made against the union. The union is then given an opportunity to present its evidence to the contrary.

What can the Board do if it finds that the union has not fairly represented the employee?
The Board has wide powers to fashion a remedy to the problem; it may order what, if anything, shall be done or not done. Such an order might include a cease and desist direction; an award of damages and interest; a referral of the grievance to arbitration; and a requirement that the union sign and distribute notices stating that it was found in violation of the Labour Relations Act and undertaking to comply with the Act in the future.

If the employee seeks a remedy affecting the employer, the employer should be named as a party to the application.

Applications -- Filling in the Forms

All complaints of a violation of any section of the Act are made on forms provided by the Board. The Board's Rules of Procedure should be consulted when filling out these forms. The Rules are divided into five Parts. Part I sets out the definitions. Part II is a general set of rules which apply to all cases. The third part consists of specific sections for particular kinds of cases such as certification, first contract, expedited hearings and others. When completing a form, persons should first read the general rules and then see if there is a specific section covering their case. If there is a specific rule and if it conflicts with the general rule, the specific rule should be followed. Copies of the Board's forms and Rules of Procedure can be obtained by calling, writing or visiting the Ontario Labour Relations Board at:

400 University Ave.
Toronto, Ontario
M7A 1V4
(416) 326-7500

The person, organization or company complaining to the Board is called the applicant. The person or organization or company against whom the complaint is made is called the responding party. The form should be read carefully and should set out the names and addresses of the parties. This is necessary so that everyone that may be affected can receive notice of the complaint. The sections of the Act violated must also be set out with a detailed statement of the actions that are believed to amount to a violation. It is important that all of the facts on which the complaint is based are set out. The party against whom the complaint has been made is entitled to know the particulars of the complaint against it. (Section 91, Rules 3-24)

It is very important to follow the rules when filling out the Board's forms. If you do not, the board may not process your application or response, or may decide the application without giving you further notice. (Section 105(2)(1), Rules 17 - 22)

For more detailed information about completing and filing unfair labour practice complaints with the Board, see the pamphlet published by the Board entitled 'Unfair Labour Practice Proceedings Before the Ontario Labour Relations Board'.

Termination of Bargaining Rights

Once a union has been certified, can the employees later change unions, or decide not to be represented by a union at all?
Yes. The employees can have the bargaining rights of a union terminated.

How do employees switch unions?
The procedure is fairly simple. The second union merely applies to the Board for certification. Once it is certified, the first union automatically loses its bargaining rights. (Section 57)

When can employees switch unions if there is a collective agreement?
If there is an existing collective agreement, the new union's application can be made after the commencement of the last two months of its operation. If, however, the agreement is for more than three years, the application can be made in the last two months of its third year of operation, and the last two months of each following year, and after the commencement of the last two months of its operation.

The entitlement to make an application after the expiry of the agreement will depend upon whether a conciliation officer had been appointed and whether a legal strike has commenced. If the old union and employer have been trying to negotiate a replacement for a previous collective agreement, the new union cannot apply until at least a year has passed since the appointment of a conciliation officer. (Sections 58, 62) If the old union has been certified, but no agreement is in operation, the new union can apply only after one year (six months in the construction industry) from the date of the old union's certification. This period of time may be extended if the incumbent union has gone through the conciliation process or has commenced a legal strike or if the employer has legally locked out its employees.

If there is a voluntary recognition agreement instead of certification, the union with rights under the voluntary recognition agreement may be challenged during the first year of its operation. If the trade union has been voluntarily recognized by the employer, another trade union may, in the first year after recognition, apply for a declaration that at the time of the voluntary recognition the first trade union was not entitled to represent the employees. (Section 61)

Can employees apply to terminate a union's bargaining rights without seeking the certification of a new union?
Yes. Employees can bring an application to terminate the union's bargaining rights.

When can a termination application be made?
Generally a termination application can be brought by employees at the same time as a new union would be able to seek certification. In addition, employees may seek termination of a union's bargaining rights if it fails to give notice to bargain within 60 days after certification; if it fails to give notice to bargain in the period of 90 days before a collective agreement ceases to operate; or fails to start bargaining within 60 days after giving such notice. (Sections 58 and 60)

The Board may also declare that a trade union no longer represents the employees in the bargaining unit if the union has obtained its certificate by fraud. (Section 59)

How do employees apply to terminate a union's bargaining rights?
The application is made on Form A-6, seven copies of which must be filed with the Ontario Labour Relations Board where the application is made under section 58. Evidence that employees do not wish to be represented by a trade union (usually in the form of a petition) signed by at least 45 per cent of the employees in the bargaining unit must be filed on or before the terminal date for the application. It is very important that all of the information required in Form A-6 - "Application for Termination of Bargaining Rights", including the full description of the affected bargaining unit, be provided. A copy of the most recent collective agreement may be attached to the application.

When the application is received the Board informs both the union and employer. The union is told the number of employees who have signed the petition, but not their names. The employer is asked to give the Board a list of employees in the bargaining unit, as well as documents containing signatures of the employees so that the signatures on the petition can be checked.

The employer is also sent copies of Form B-12 - "Notice to Employees of Termination application and of Hearing", to post. This tells the affected employees about the application, and lets them know that they can oppose the application by filing signed evidence that employees wish to be represented by the trade union prior to the terminal date (usually in the form of a petition) and by testifying at the hearing. The union must file a response to the application on or before the terminal date. If the employer wishes to take part in the proceedings, it must file an intervention on Form A-6 on or before the terminal date. (Section 58 and Rules 52-58)

What is the procedure at the hearing of an application under Section 58?
The Board first determines whether at least 45 per cent of the employees in the unit have signed the petition. If less than 45 per cent have signed the petition, the Board must dismiss the application. The Board then conducts an inquiry to make certain the petition is a voluntary expression of the employees who signed it. It asks one or more people to give evidence under oath about the origination and circulation of the petition.

This is done to make sure no member of management was involved. Each signature on the petition must be identified by a person who saw the signature being placed on the petition, and who can give evidence about the circumstances under which the employee signed.

A union representative is allowed to cross-examine the witnesses who testify in support of the petition and to present evidence to show that the petition was not voluntary.

What are the requirements for a petition to be valid?
There is no standard form for a termination petition. However, in order to be valid, a termination petition must name the union, the employer and a contact person for the employer and state clearly that the employee or employees who have signed it no longer wish to be represented by the trade union. The petition must be signed by the employee or employees concerned and must show the date that each signature was obtained. The petition must be filed with the Board by the terminal date. (Rules 55 - 58)

What happens if the Board finds that the petition is voluntary?
The Board then conducts a representation vote. If a majority of the ballots cast oppose the union, the Board will terminate the union's bargaining rights. (Section 58(3),(4))

What happens if a union decides it does not want to continue to represent the employees in a bargaining unit?
Once an application to terminate the bargaining rights of the union has been filed with the Board, the union can inform the Board that it does not want to continue to represent the employees. The Board will then terminate the union's bargaining rights without conducting a hearing. (Section 58(5))

May an employer apply to have the Board terminate a union's bargaining rights?
Generally only an employee can make such an application, and it must be done without any involvement by the employer. However, there are two instances in which an employer, as well as any of the employees in the bargaining unit, can make the application. First, if the union has not given a notice to bargain to the employer within 60 days after certification or before an existing agreement ceases to operate. Second, if the notice to bargain has been given, but the union has failed to start bargaining for a period of 60 days, or has allowed 60 days to pass without trying to bargain, provided a conciliation officer has not been appointed.

Once an employer files such an application, the Board can decide whether or not to terminate the union's bargaining rights. Generally, the Board will hold a hearing to allow the union to state its case. If the union can give a reasonable explanation for the delay, the Board will refuse to grant the employer's application.

Indeed, the Board is very reluctant to grant this type of application except in instances where the trade union is clearly 'sleeping' on its rights. Even then, the Board may hold a vote among the employees to get their feelings about the matter. (Section 60)

Are there any other situations in which the Board can terminate a union's bargaining rights?
Yes. If the union was originally certified as a result of fraud. At any time the Board becomes aware of such fraud, it can terminate the union's bargaining rights. Such action would nullify any collective agreement the union may have made after being certified. A union may also have its bargaining rights terminated if the union obtained those rights through voluntary recognition at a time when it was not entitled to represent the employees. When such action is taken, it is then up to the voluntarily-recognized trade union to prove that at the time of voluntary recognition it was, in fact, a trade union within the meaning of the Act, that it did not receive any assistance from a member of management, and that it had the support of a majority of the affected employees. If it cannot do so, the Board can nullify both the voluntary recognition agreement and any collective agreements that the union and the employer may have entered into. (Sections 59 and 61)

Sale of Employer's Business

What happens to a union's bargaining rights and to the collective agreement when an employer's business is sold? The union retains its bargaining rights and any existing collective agreement remains in effect. In addition, the union has the right to continue with the new employer any proceedings under the Labour Relations Act or under a collective agreement. Finally, the new employer is bound by notices, conciliation and Board proceedings that were begun with the previous employer. This also is the case where one or more municipalities are amalgamated. Where a business passes from federal to provincial jurisdiction the collective agreement continues, but the union only has a right to continue proceedings which related to the collective agreement.

If any difficulties arise about the continuation of these rights, the Board can be asked to decide the issues, for example, by amending the bargaining unit or terminating the bargaining rights of a union where there is a conflict between unions because the buyer already had a union, or where the person to whom the business was sold has changed its character substantially. This can be done by filing with the Board seven copies of Form A-20 - "Sale of a Business Application". (Section 64(6))

Where a trade union takes the position that a sale of a business has taken place, the employer must introduce evidence of all relevant facts relating to the alleged sale of which it has knowledge. Where the new employer mixes the employees of the old employer with employees from other businesses carried on by the new employer, an application can be made to the Board to determine the bargaining agent, and determine or amend the bargaining unit, and seniority rights. This can be done by filing with the Board seven copies of Form A-20 - "Sale of a Business Application". (Section 64(6))

Are rights protected in the contract service sector when a new contractor is engaged to perform work?

Where employees provide cleaning services, food services or security services to a building that is their principal place of work and their employer loses the service contract to another contractor, the new contractor becomes bound to existing bargaining rights, collective agreement provisions, and proceedings under the Labour Relations Act or a collective agreement. (Section 64.2)

Related Employer

What if employers carry on related operations under common control but different names?
A trade union or employer can apply to the Board for a declaration that the corporations, firms or individuals involved are really one employer and, where the Board is satisfied that the manner in which the businesses are carried on affects the union's bargaining rights, it may treat them as one employer for example, for the purposes of an application for certification. Where such an application is made the businesses in question must introduce evidence of all relevant facts of which they have knowledge. (Section 1(4), 1(5))

Illegal Strikes and Lock-outs

What is an illegal strike?
In general, an illegal strike is one that occurs either: 1. before a union gains bargaining rights through certification; 2. when a union is negotiating for a collective agreement, but has not exhausted the conciliation provisions of the Act; or, 3. during the term of a collective agreement. (Section 74)

Is it an illegal strike if employees merely agree not to go in to work?
Yes. If employees by agreement 'book off sick' or 'slow down' or conduct a 'study session', thereby limiting or restricting their output, they are engaging in an illegal strike. (Section 1(1))

Any provision in a collective agreement that allows employees to engage in a work stoppage during the term of the agreement conflicts with the Labour Relations Act, and any such work stoppage is an illegal strike. (Section 43)

Is it an illegal strike if the workers walk off the job without the support of the trade union?
Yes. What they are doing is illegal, whether or not the union supports their action.

What can employers do if their employees engage in an illegal strike?
Employers can do one or more of several things. They can seek a declaration from the Ontario Labour Relations Board that the strike is unlawful. They can ask the Board for an order directing the employees to return to work, which can be enforced in the courts. They can seek the Board's consent to prosecute the employees -- and the union, if the union called or authorized the strike. They can take disciplinary action against the employees and they can seek to recover damages for the losses suffered as a result of the strike from the union or the employees. Employers may also obtain a declaration and direction when an illegal strike is threatened. The Board's order can be filed in the Ontario Court (General Division) to be enforced as an order of that court. (Section 94, 137)

How does an employer obtain a declaration of unlawful strike, and what is its effect?
An application for such a declaration is made on Form A-45 - "Application under s.94, s.95 or s.137". Even if the Board finds that a strike is unlawful, it does not have to make such a declaration. Generally it will not if, prior to the hearing, the employees have returned to work -- unless there has been a pattern of illegal work stoppages. A declaration of unlawful strike is not meant to be punitive, it is merely to inform the people involved that the strike is, in fact, unlawful.

How does an employer obtain an order directing employees to return to work and how is it enforced?
The employer may, using Form A-45 - "Application under s.94, s.95, or s.137", apply to the Board for a declaration that the strike is unlawful and for directions that the employees return to work. The employer can also request the Board, on Form A-61 - "Request to Expedite" to expedite the hearing into the unlawful strike application. (See the heading "Expediting Proceedings" at page 55) (Section 94, Rules 94 -98). If the Board directs employees to return to work, the direction is filed with the Ontario Court (General Division) and can be enforced in the same way as an order of that court. (Section 96)

Can an employer take disciplinary action against employees for an unlawful strike?
Yes. However, if a collective agreement is in operation, the employees affected may file a grievance against this discipline through the normal arbitration route. Generally, arbitrators are not very sympathetic to employees who have engaged in an unlawful strike. However, the facts about the strike, the seniority of the employees involved and the role each employee played in the strike will usually be taken into consideration.

Is the mere authorization or threatening of an unlawful strike prohibited?
Yes, unions and union officials are prohibited from authorizing, threatening or supporting an unlawful strike. (Sections 76 and 94)

Can someone causing others to engage in an unlawful strike be be in violation of the Act?
Yes. If a person does anything which he or she knows or should know, would cause others to engage in an unlawful strike, he or she will be committing an offence. For example, putting up a picket line (except where such picket line is in connection with a lawful strike or lock-out) that causes others to engage in an unlawful strike by refusing to cross, is unlawful. (Section 78)

Can an employer seek damages from a union for an illegal strike?
Yes. An employer can file a grievance against the union seeking damages for losses suffered because of an unlawful strike during the term of a collective agreement. To be successful, however, the employer would have to demonstrate that the trade union called, or at least agreed to, the unlawful strike.

If no collective agreement is in operation at the time of the unlawful strike, the employer may go directly to arbitration in an attempt to get damages from the union if the Ontario Labour Relations Board has declared the strike unlawful. (Section 97)

When is a lock-out unlawful?
It is unlawful if it occurs during the term of a collective agreement and at any time other than following the conclusion of a conciliation process (and the relevant number of 'extra days'). The threatening of an unlawful lock-out is also prohibited. (Section 74)

What can the employees do if they believe they are being unlawfully locked out?
Their union may apply to the Ontario Labour Relations Board for a declaration that the lock-out is unlawful and for a direction compelling the employer to end the lock-out by using Form A-45 - "Application under s.94, s.95, or s.137". The Board's order can be filed in the Ontario Court (General Division) to be enforced as an order of that Court (Section 96). Employees outside the construction industry must have their union seek a declaration of unlawful lock-out before a direction to end a lock-out can be granted. Both applications can be dealt with at the same time. The trade union may also apply for consent to prosecute the employer, using Form A-51 - "Application for Consent to Institute Prosecution".

Employees unlawfully locked out might also be able to collect lost wages through the grievance and arbitration procedure in their collective agreement. Where there is no collective agreement, the Act provides for a system of arbitration, similar to that in force under collective agreements, when the Board has granted a declaration of unlawful lock-out. Relief may also be available from the Board if an unfair labour practice complaint is filed under section 91, but the Board will usually require that the parties attempt to resolve the matter by arbitration before it will deal with such a complaint. (Section 95, 97, 137(2))

Internal Union Affairs

What can a member do if he or she disagrees with something the union does or if he or she is expelled from the union?
A union member has the right to enforce his or her union's constitution if it is being violated by others in the union. This is done through the appeal procedures set out in the constitution if such procedures are provided.

If there is no procedure, or if it is inadequate, the member can commence legal proceedings in the civil courts. The courts have the right to ensure that a union abides by its own constitution. A union member cannot ask the courts to interfere with the internal affairs of a union merely because the member is unhappy with some particular action taken by the union. The action must be contrary to the union's constitution or by-laws before the courts can grant a remedy.

There are no procedures available before the Board to resolve disputes arising from union constitutions.

Can a union local be put under trusteeship?
If the constitution of a union says that locals can be put under trusteeship (and most do), then the parent union can impose a trusteeship. The reasons for doing so and the procedure to follow, are stated in the constitution. Such a trusteeship normally puts the local under the administration of a person appointed by the parent union. Within 60 days the parent union must file information about the trusteeship with the Board. (Section 84(1))

This is done on a form entitled 'Statement of Trusteeship Over Local Union to the Ontario Labour Relations Board'. (Form 6 in Regulation 684 of R.R.O. 1990). The form must be verified by a notarized statement from the principal officers of the parent union. If the trusteeship is to last longer than a year, then the Board must give its approval. (Section 84(2))

Are members entitled to their union's financial statement?
Yes. A member wishing a copy of the last audited financial statement may request it from the union. If the union does not provide the financial statement, the member can complain to the Ontario Labour Relations Board, using Form A-55. The Board can then order the union to provide copies both to the member and the Board itself.

If a union member feels that an audited financial statement received from the union is inadequate, a complaint can be filed with the Board using Form A-57. This may be done whether or not the member received the audited financial statement as a result of an order of the Board. The Board can order the trade union to prepare a new statement that contains additional information or that is certified by an accountant.

Where a union has a welfare fund or plan that is established only for the benefit of union members, the person responsible for administering it must file certain information with the Minister of Labour every year concerning the fund or plan. Where the administrator fails to do so, a union member may apply to the Board for an order compelling the administrator to do so. A similar application may be made where information supplied by the administrator does not meet the requirements of the Act. (Sections 86, 87, 88)

Adjustment Plan

What is an adjustment plan?
An adjustment plan is a plan negotiated by the union and employer, to assist employees who are going to be laid off in certain situations. The plan can address, among other things, employee needs such as job counselling, retraining, notice of termination, severance and termination pay, entitlement to benefits such as early retirement benefits, or other matters agreed on. (Section 41.1(5))

When must an adjustment plan be negotiated?
When the employer plans to layoff 50 or more employees, or to permanently close all or part of the business, notice must be given to the union not later than the first day the employer is required to give affected employees notice of termination under section 57 of the Employment Standards Act. The union can then request that the employer negotiate an adjustment plan and the employer must, within seven days, begin to negotiate and bargain in good faith. The Board can determine whether or not the parties are bargaining in good faith, but cannot be called upon to decide what should be in an adjustment plan. (Section 41.1(4),(5), 91(4.1))

What happens if one of the parties does not abide by the terms of the adjustment plan?
A negotiated adjustment plan is considered to be part of the collective agreement between the employer and union. Therefore, if a party does not live up to a provision in the adjustment plan, the other party can initiate a grievance under the grievance process set out in the collective agreement. If a first collective agreement has not yet been negotiated, or the collective agreement has expired, either party can request the Minister to appoint a single arbitrator to determine the difference. (Section 41.1(6)(7))

Jurisdictional Disputes

What is a jurisdictional dispute?
Disputes may arise between trade unions, particularly in the construction industry, regarding the right to be assigned particular work. The Board is vested with authority to resolve these disputes over work jurisdiction.

When can a complaint be filed?
A jurisdictional dispute application may be filed with the Board where one trade union feels that an employer, on its own initiative, or where required by another union, assigns work to persons in that other union rather than to persons in its own union.

An application can be made by completing and filing with the Board 7 copies of Form A-42 - "Application Concerning Work Assignment". Detailed written submissions must be included in the application, and the application must be delivered to the responding party before it is filed with the Board. (Rule 72-75)

Does the Board have to hold a hearing before deciding a jurisdictional dispute?
No. The board can make a decision after either a) holding a hearing, b) holding a "consultation" where the parties make arguments based on the written submissions, or c) doing both. (Section 93, 104(14.2), Rule 76)

What are the powers of the Board in relation to a jurisdictional dispute?
The Board has wide discretion in deciding whether to intervene on the receipt of an application. Where the Board intervenes, it may direct the assignment of work or issue a cease and desist order in respect of the assignment. It may also alter the bargaining unit described in a collective agreement or a certificate.

What factors will the Board take into account in making a determination?
The Board will consider, among other things, the jurisdiction of the competing trade unions as set out in their constitutions and collective agreements with the employer, existing agreements between the competing trade unions as to work jurisdiction, past practice in the area and in the particular industry, the nature of the work, the skills involved and the safety, efficiency and economy in the performance of the work. (Section 93)

Construction Industry

What is the construction industry?
The construction industry is comprised of businesses that are engaged in the constructing, altering, decorating, repairing or demolishing of buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the job site. (Section 1(1))

Why are there special provisions of the Labour Relations Act dealing with the construction industry?
Typically, the length of the employment relationship with a particular employer in the construction industry is relatively short. In the course of a year, a typical employee in the construction industry may expect to work for several employers. The mobility of employees and employers in the construction industry gave rise to special considerations in collective bargaining. Also, the variety of the types of work in the construction industry, the existence of employers' organizations, local trade unions in different locations in Ontario and the representation of employees by different trade unions on the basis of different skills required the legislature to develop a distinct scheme to deal with collective bargaining in the construction industry.

What is the scheme of collective bargaining in the construction industry?
Collective bargaining in the construction industry is conducted on a craft and province-wide basis in the industrial, commercial and institutional sector of the construction industry. In the other sectors of the construction industry generally, collective bargaining is also conducted on a craft basis but with reference to specific geographic areas of the province usually determined by mutual agreement between employers and trade unions. These areas need not necessarily conform to the board geographic areas that the Board uses in determining the scope of construction industry bargaining units in certification proceedings.

What is a sector of the construction industry?
A sector is defined by the Act to mean a division of the construction industry that is determined by work characteristics and includes the industrial, commercial and institutional sector, the residential sector, the sewers and water mains sector, the roads sector, the heavy engineering sector, the pipeline sector and the electrical power systems sector. The concept of sector reflects the diversity of the work performed and the projects undertaken in the construction industry and the special considerations that apply to employers, employees and trade unions that represent such employees in the various sectors. (Section 119)

Who is an employer in the construction industry?
An employer in the construction industry is a person who operates a business in the construction industry. Such employers may include employers whose principal business is not in the construction industry or who engage in a business in the construction industry or who engage in a business in the construction industry for a short period of time and who may have no intention of engaging in work in the construction industry in the future. For example, the Board has found that municipalities, supermarkets, school boards and motels are all employers in the construction industry when they are engaged in construction work. (Section 119)

Which trade unions may make an application to represent employees in the construction industry?
Any trade union may seek to represent employees in the construction industry. However, only a trade union that according to established trade union practice pertains to the construction industry may be able to use the special provisions of the Act dealing with the construction industry. (Section 119)

What is a trade union that according to established trade union practice pertains to the construction industry?
The Board has found that it is a trade union that has entered into collective agreements with employers who operate businesses in the construction industry, and that cover employees in the construction industry. The established trade union practice arises from the acts of a trade union in seeking to represent and in representing such employees.

Is there always a hearing before the Board where an application for certification is brought under the construction industry sections of the Act?
The Board need not hold a hearing upon an application for certification that is filed under the construction industry provisions of the Act. The Board addresses itself to the issues raised in an application for certification in its written decision. Where it is not possible to resolve an issue in an application for certification based upon the material filed with it, the Board may appoint a labour relations officer to contact the parties. Failing a resolution of the issues, the Board will schedule a hearing and will notify the employer, the union and any employees who have filed a statement of desire in relation to the application. (Section 104(14), Rule 110)

How does the Board ascertain the number of employees in a bargaining unit in an application for certification that has been filed under the construction industry provisions of the Act?
The Board ascertains this number by determining the number of employees in the appropriate bargaining unit who are at work on the date of the filing of the application. The Board does not have regard to the day-to-day variations in the number of employees. This approach recognizes that the number of employees in the bargaining unit fluctuates from day to day for reasons of scheduling and progression of work. The Board need not consider any increase in the number of employees in the bargaining unit after the day the application was filed. (Section 121(2))

Are certification proceedings before the Board with respect to the construction industry expedited in any way?
Yes. Due to the nature of the construction industry and its need for expedition, the Board provides for shorter time periods in an application for certification under the construction industry provisions of the Act. In addition, a panel of the Board considers such applications on the working day after the terminal date and, if possible, renders its written decision on the same day. (Rule 89)

What are appropriate bargaining units in the construction industry?
Appropriate bargaining units in the construction industry are usually craft bargaining units. However, where a trade union that files an application does not satisfy the requirements for obtaining a craft bargaining unit or where a trade union that satisfies those requirements seeks to represent a bargaining unit of employees who do not come within its craft jurisdiction, or that is comprised of employees coming within and falling outside of its craft jurisdiction, the appropriate bargaining unit is determined by the Board under its normal provisions for determining appropriate units. Such non-craft bargaining units normally include all unrepresented classifications of employees who were at work on the date of the filing of the application in the Board geographic area where the employees were working (Sections 6(1), 6(3) and 121(1))

What is a Board geographic area?
The Act requires the Board to determine the appropriate bargaining unit by reference to a geographic area. The Board has divided much of Ontario into geographic areas. These geographic areas are essentially a reflection of (with some modifications and extensions) areas of collective bargaining between trade unions or councils of trade unions and employers' organizations which existed prior to the introduction of the construction industry provisions of the Act in 1962.

When can an application for termination of bargaining rights in the construction industry be made?
You should refer to the termination of bargaining rights section of this booklet. (See page 60) However, some of the time limits are different in the construction industry. If a trade union does not make a collective agreement with the employer within six months after its certification, any of the employees in the bargaining unit may apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit. Also, any of the employees in the bargaining unit described in the first collective agreement between an employer and a trade union where the trade union was not certified, may apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit between the 305th day and 365th day of the collective agreement's operation. (Section 125)

Is there an expeditious procedure to deal with grievances arising under construction industry collective agreements?
Yes. In addition to the expedited arbitration procedures available under section 46 of the Labour Relations Act, grievances arising in the construction industry may be referred to the Ontario Labour Relations Board for arbitration. The Board is required by the Act to hold a hearing within 14 days of the referral to arbitration being filed with it. (Section 126)

Are fees payable to the Board for arbitration?
Yes. Fees are payable by each party for each day or part of a day a hearing is held by the Board. These fees are set by regulations under the Act.

Where the parties settle their grievance prior to a hearing, either with or without the assistance of a labour relations officer, no fee is charged.

What is accreditation in the construction industry?
Accreditation of an employers' organization may be considered analogous to certification of a union. An employers' organization may apply to be accredited as the bargaining agent for all employers in a particular sector or sectors of the construction industry, (save for the industrial, commercial and institutional sector, which is governed by the province-wide bargaining portion of the Act) in a defined geographic area for whose employees a trade union holds bargaining rights. Where the Board is satisfied that the employers' organization represents a majority of employers in the appropriate unit who employ a majority of the employees employed by all employers in that unit, a certificate of accreditation is issued to the employers' organization to represent in bargaining all employers in that unit.

A collective agreement between a trade union and an accredited employers' organization is binding upon all employers in the unit, whether or not an employer is a member of the employers' organization. Where a trade union that is a party to a collective agreement with an accredited employers' organization obtains bargaining rights, whether by certification or voluntary recognition, for employees of an employer who would be covered by that collective agreement, the employer and the trade union are bound by that collective agreement. (Sections 129, 130(4))

What is province-wide bargaining in the Construction Industry and who is affected by province-wide (provincial) collective agreements?

Province-wide bargaining is applicable only to the industrial, commercial and institutional sector of the construction industry. Unions that are affiliated with a designated or certified employee bargaining agency and employers for whom a designated or accredited employer bargaining agency holds bargaining rights are subject to province-wide bargaining. The employee and employer bargaining agents attempt to negotiate a provincial agreement. The employee bargaining agency may call a strike or the employer bargaining agency may call a lock-out if no agreement can be reached after exhaustion of the conciliation process. A strike or lock-out must be conducted on a province-wide basis. Where a strike vote, lock-out vote or ratification vote is conducted relating to provincial bargaining, the Act sets out who is eligible to vote. The party conducting the vote is required to report the results to the Minister within five days of the vote. The Minister may refer to the Board any complaint alleging that the rules as to voter eligibility have been violated. (Section 152). Once a provincial agreement is reached, it is binding upon the unions affiliated with the employee bargaining agency and the employers for whose employees an affiliated local union holds bargaining rights. When an affiliated local union obtains bargaining rights for employees of an employer in relation to the industrial, commercial, and institutional sector, whether by certification or voluntary recognition, that employer and the affiliated local union are bound by the appropriate provincial agreement. (Sections 139(2), 149, 150)

A P P E N D I X

OUTLINE OF THE LABOUR RELATIONS ACT

Section 1	Definitions.
Section 1(3)	Persons who are not covered by the Act.
Section 1(4)	Related employers.
Section 2	More persons not covered.
Certification	
Sections 5-12	How a union acquires bargaining rights by certification - a union is certified as the exclusive bargaining agent for a group of employees whom the Board considers to be appropriate for collective bargaining, when the majority of those employees want union representation.
Section 13	Unions dominated by the employer or unions that discriminate cannot be certified.
Negotiations	
Section 14	After certification union gives notice to the employer that it wants to begin bargaining.
Section 15	Both parties must meet and bargain in good faith.
Sections 16-40	Conciliation and other forms of third party intervention to assist the parties to reach an agreement.
Section 41	First contract arbitration.
Contents of Agreements	
Section 42	Agreement must recognize the union as the exclusive bargaining agent
Sections 43-45	All agreements must have a clause providing that there will be no strikes or lock-outs during its term and that disputes concerning the interpretation or administration of the agreement must be resolved by an arbitrator.
Section 46	Referral of grievances to single arbitrator for expedited hearing.
Sections 44, 47	Union security clauses in collective agreements. (i.e. clauses requiring compulsory membership or payment of dues). However, they cannot be used to stifle internal union protest.
Section 48	Religious exemption from union membership.

Operation of Agreements

Section 49	Collective agreements signed by unions that discriminate or are influenced by the employers are invalid.
Section 50-53	Binding effect of collective agreements and minimum term of one year; renegotiation procedure.

Termination of Bargaining Rights

Sections 57-62	Termination of bargaining rights.

Successor Rights

Sections 63-64	Effect on bargaining rights of trade union mergers or the sale of the employer's business.

Unfair Practices

Sections 65-71	Unfair labour practices - unlawful interference with the right to organize.
Sections 74-78	Regulation of unlawful strikes and lock-outs.
Section 81	Working conditions may not be altered when application for certification pending before the board or when parties are negotiating.
Section 82	Protection of witnesses.
Section 83	Prohibition against removal destruction etc. of Board notices posted.

Trusteeship

Section 84	Regulation of 'trusteeships', i.e. where a parent union suspends the autonomy of one of its locals.

Information

Sections 85-88	Information that a union must provide to the ministry and to its members.

Enforcement

Section 91	Enforcement procedure for all alleged violations of the Act.
Section 93	Board may resolve jurisdictional disputes.
Sections 94-96	Declarations and cease and desist directions regarding unlawful strikes and lock-outs.
Sections 98-103	Offences, fines and other penalties that may be sought in provincial court with the consent of the Board.

Administration

Sections 104-112	Administration of the Board.

General

Sections 113-118	Secrecy of union membership, regulations regarding time limits for doing certain things.

Construction Industry

Sections 119-154	Special provisions for the construction industry.
Section 126	Power of the Board to act as arbitrator and resolve disputes as to the interpretation of construction industry agreements.
Section 152	Vote procedures for strikes, lock-outs and ratification of provincial agreements.